Supreme Court, U.S.
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NO. _____

In The

SUPREME COURT OF THE UNITED STATES

DONALD JAMES BOHANA
Petitioner,

vs.

TOM E. VAUGHN, WARDEN, of the California State Prison at Chuckawalla Valley and JEANNE S. WOODFORD, DIRECTOR OF CALIFORNIA DEPARTMENT OF CORRECTIONS,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a Certificate of Appealability should have been issued by the Ninth Circuit on petitioner's motion to expand the certificate of appealibility to the two uncertified issues set forth in his opening brief to resolve the substantial constitutional issues raised by petitioner, debatable by reasonable jurists, regarding the effectiveness of his trial counsel based on the incompetence of trial counsel in rejecting all defense expert forensic witnesses who could have provided exculpatory testimony and corroborated petitioner's version of the events and instead solely relied on his cross-examination of the prosecution's two expert witnesses and petitioner's uncorroborated and poorly received testimony at trial with counsel compounding his deficient performance by relying on the erroneous legal analysis provided by his son, who was studying for the bar examination, and without verifying his son's advice as to the applicable law on misdemeanor involuntary manslaughter, despite prosecution forensic evidence suggesting the defense, the trial court's invitation to so instruct the jury, and the jury's note asking if they could reach a verdict other than second degree murder, counsel thereby invited the error, and making it unreviewable on direct appeal?

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1. Certiorari Should Be Granted and a Certificate of Appealability Issued Because Bohana Met the Criteria for a Certificate of Appealability on the two uncertfied issues based on the incompetence of Bohana's trial counsel in rejecting all defense expert forensic witnesses who could have provided exculpatory testimony and corroborated Bohana's version of the events, after counsel was unable to introduce an exonerating polygraph examination of Bohana, and instead solely relied on his cross-examination of the prosecution's two expert witnesses and Bohana's uncorroborated and poorly received testimony at trial with counsel compounding his incompetence by relying on the erroneous legal analysis provided by his son, who was studying for the bar examination, and without even verifying his son's advice as to the applicable law on misdemeanor involuntary

manslaughter despite prosecution forensic evidence suggesting the defense, the trial court's invitation to so instruct the jury, and the jury's note asking if they could reach a verdict other than second degree murder, counsel thereby invited the error, and making it unreviewable on direct appeal. 10

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BASIS OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) from the final judgment of the Court of Appeals for the Ninth Circuit.

FRAP 22(b)(2) states: "If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate. Ninth Circuit Rule 22-1(e) provides: "[I]f a petitioner concludes during the course of preparing the opening brief, that an uncertified issue should be discussed in the brief, the petitioner shall first brief all certified issues under the heading, 'Certified Issues,' and then, in the same brief, shall discuss any uncertified issues under the heading, 'Uncertified Issues.' Uncertified issues raised and designated in this manner will be construed as a motion to expand the COA and will be addressed by the merits panel to such extent as it deems appropriate."

This Court's jurisdiction to review the Ninth Circuit Court of Appeals' denial of a certificate of appealibility to the uncertified issues in appellant's opening brief is invoked under *Hohn v. United States*, 524 U.S. 236, 247, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998), and is timely.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fifth and Sixth Amendments; 28 U.S.C. §2253(c)(1)(A); FRAP 22(b); and Ninth Circuit Rule 22-1(e) are all set forth in Appendix D.

STATEMENT OF THE CASE AND FACTS

On July 2, 1998, a jury found Bohana guilty in Los Angeles County Superior Court. On November 23, 1998, Bohana was sentenced to an indeterminate term of imprisonment for 15 years to life. Bohana appealed his conviction to the California Court of Appeal. On October 25, 2000, the state court affirmed the judgment. *People v. Bohana*, 84 Cal. App. 4th 360, 100 Cal. Rptr. 2d 845 (2000). A petition for review in the California Supreme Court was denied on February 14, 2001.

On January 8, 2002, a petition for writ of habeas corpus was filed in the Los Angeles County Superior Court. The petition was summarily denied on February 5, 2002. On February 22, 2002, a petition for writ of habeas corpus was filed in the California Court of Appeal. The petition was summarily denied on April 24, 2002.

Bohana filed a petition for review of the habeas denial in the California Supreme Court. On July 17, 2002, that Court granted review and directed the Court of Appeal to vacate its summary denial of the habeas corpus petition and issue an order to show cause, returnable to the Los Angeles County Superior Court, on two claims: (1) did trial counsel render ineffective assistance in failing to call experts to

testify at trial; and (2) did trial counsel render ineffective assistance in failing to request CALJIC No. 8.45 (Involuntary Manslaughter - Defined) based on commission of an unlawful act not amounting to a felony.

An evidentiary hearing was held in the Los Angeles Superior Court on July 21, July 22, and August 6, 2003. On October 10, 2003, the trial court denied the petition for a writ of habeas corpus.

Bohana filed a petition for writ of habeas corpus in the California Court of Appeal. The petition was summarily denied. Bohana sought review in the California Supreme Court and review was summarily denied on April 21, 2004. Two justices were of the view that review should be granted.

Bohana's 28 U.S.C. section 2254 petition for writ of habeas corpus was filed in the district court on April 29, 2004. On February 8, 2008, the Report and Recommendation of the United States Magistrate Judge was filed. In the Report and Recommendation, the Magistrate Judge ruled that with respect to Bohana's ineffective assistance of counsel claim regarding counsel's failure to advise Bohana that he would not have to testify based on an excusable homicide or manslaughter defense because if the defense at trial had been excusable homicide, "defense counsel would have been obliged to explain why Bohana previously told a different story to the police and to Jackson's friends and relatives. Thus, an excusable homicide defense would have been damaging to Bohana's credibility regardless of whether he testified, because his counsel would have to admit that Bohana's early descriptions of the events were a lie. . . . . The same would have been true if counsel had presented a defense that Jackson's

death was only manslaughter. The Report therefore concludes that "even if defense counsel did not discuss alternative defenses with Petitioner, his failure to do so was not deficient and did not constitute ineffective assistance.

The district court judge expressly addressed certain of Bohana's objections and adopted the findings and conclusions set forth in the Report and Recommendation and ordered the petition denied and dismissed on October 14, 2008. The Judgment and Order denying and dismissing the habeas petition was entered on October 14, 2008. Bohana's Notice of Appeal was filed on November 12, 2008 Bohana's Application for Certificate of Appealability and was granted in part by the district court on January 6, 2009.

On July 22, 2010, the Ninth Circuit Court of Appeals denied Bohana's appeal and his motion to expand certificate of appealibility as to two issues regarding the effectiveness of his counsel. His petition for rehearing was denied on October 10, 2010.

Bohana, 60, was convicted of the second-degree murder of Michael Jackson's former sister-in-law, Delores "Dee Dee" Jackson, who drowned in Bohana's pool with a blood alcohol level of .22 (*approximately 3 times the legal level*).

The decedent's former husband, Tito Jackson, Katherine Jackson, the matriarch of the Jackson musical family, and two of Michael Jackson's nephews testified for the prosecution that Ms. Jackson could not swim and was afraid of water. Other prosecution witnesses, as well as Bohana, testified that she had begun to learn how to swim in Bohana's pool and was no longer afraid of water.

Bohana was a local businessman, entrepreneur, and civic leader. He was the first African-American to receive a Denny's franchise; was one of the founders of the Guardian Bank in downtown Los Angeles; owned the California Life Insurance Company, and was the former Administrator of West Adams Community Hospital, the first Western hospital owned by African-American doctors. He was the Chairman of the Board of the L.A. County Aviation Commission for 14 years, and the Chairman of the L.A. County Adoption Agency for 8 years.

Bohana testified that Ms. Jackson's death was an accidental drowning. Jackson was swimming in his pool, when he saw that she in trouble; he dove into the water to rescue her but was unable able to do so on his first try while she was underwater. After calling 911, he used a pool skimmer to raise her to the surface, pulled her out of the pool, and attempted to revive her, and was in the process of doing so when the paramedics arrived. The paramedics intubated Jackson and used defibrillator paddles on her chest in an attempt to revive her.

The prosecution advanced no motive for the drowning nor were they any defensive wounds found on Jackson's body. Initially, Dr. David Posey of the L.A. Coroner's Office ruled that the mode of death was "undetermined." Two years later, after being informed by William Richardson, the prosecution's swimming expert, that it is usually the rescuer, not the swimmer, who is injured, Posey concluded that findings on autopsy were not consistent with a rescue effort and changed the mode of death to "homicide."

Los Angeles attorney Harlan Braun incompetently represented Bohana at trial. In this complex circumstantial drowning case with

experienced prosecution experts, Braun relied on his fading rhetorical and cross-examination skills and Bohana's own testimony. Braun ineffectively failed to call readily available, well qualified experts in forensic pathology and in drowning cases, who had independently concluded, based on the same evidence as the prosecution witnesses and visits to the alleged crime scene (not made by the prosecution experts) that the drowning was indeed accidental, and thereby scientifically and conclusively rebut the opinions of the state expert that the decedent's bruises and scratches were inconsistent with Bohana's rescue and revival efforts.

Braun utterly failed to properly research and present the law on the defenses to the murder charge in this case. Braun admitted at the state evidentiary hearing on Bohana's state petition for habeas corpus ("state hearing") that he simply forgot that misdemeanor involuntary manslaughter was an alternative defense in Bohana's case.

Compounding this inexcusable omission, Braun thereafter erroneously objected to the trial court *sua sponte* instructing the jury on involuntary manslaughter based on his erroneous belief that a misdemeanor could not be the predicate for involuntary manslaughter. He told the trial court that his son, a law student studying for the bar exam, informed him of the "rule" that a misdemeanor cannot be a predicate the night before. Braun did not bother to consult hornbook law, other attorneys or any other legal authorities regarding this well settled point of law that was critical to Bohana's defense.

Internationally known forensic pathology expert Michael Baden, M.D., concluded that the drowning was accidental. Braun did not call Dr. Baden or any

other expert to scientifically prove that: (1) the drowning was accidental; (2) to corroborate Bohana's description of the events prior to the drowning; and (3) to support Bohanna's testimony of his rescue and revival attempts. Instead, Braun simply rolled the dice and did not present *any* reasonable and legally supportable defense at trial, based on his objectively unreasonable beliefs that he had gotten what he wanted from Dr. Posey and that the testimony of the prosecution's lifeguard expert that controverted Bohana's description of his rescue was simply unimportant.[1/]

If Braun had adequately consulted with Baden, he would have known that Baden was neither "mushy" nor a "defense whore" as he testified at the state hearing. This was established by Dr. Baden's testimony at the state hearing, where the hearing judge described Baden's testimony as "very impressive" testimony that "could have contributed something useful" at trial.

Incredibly, Braun was laboring under the false assumption that if he obtained an expert report from Baden he had to turn it over to the prosecution so he

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[1/] Braun also gambled on the fact that a window would present itself at trial where he could introduce the fact that Bohana passed a polygraph test administered by nationally known expert and FBI Instructor Edward Gelb. Gelb's high profile clients have included O.J. Simpson and John and Patsy Ramsey (parents of JonBenet Ramsey). Gelb is a past President, Executive director, and Chairman of the Board of the American Polygraph Association and in 1998, earned the association's Leonarde Keeler Award "for long and distinguished service to the polygraph profession."

simply did not ask for one.[2/] However, under California criminal discovery rules, an attorney only has to turn over an expert's report "if he or she intends to call the witnesses at trial, together with...reports or statements of those persons, including any reports or statements of experts, ... which the defendant intends to offer in evidence at trial." *See* California Penal Code § 1054.3(a); *Izazaga v. Superior Court*, 54 Cal.3d 356 (1991). Further, Braun's state hearing testimony contradicted his own declaration submitted prior to the hearing, in which he offered, as an excuse for not calling Baden, the fact that Baden never gave him a written a report. Baden testified he was never asked for a report.

If Braun was uncomfortable with Baden's preliminary, exculpatory assessment, he could have asked for a written report. If he did not like the report, Braun could just put it in his file and not call Baden as a witness. On the other hand, if he found Baden's report compelling, he would then presumably intend to call Baden as a witness and he would simply turn Baden's exculpatory expert report over to the prosecution before trial as required under Penal Code §1054.3. Thus, Braun effectively turned a win-win situation into a lose-lose situation for Bohana

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[2/] Baden stated he did not ask "[Dr. Baden] for a report for obvious reasons." When asked at the state hearing what those reasons where Braun replied, "they would become discoverable under *Izzizaga* [sic: *Izazaga*] if I have an expert report. Sometimes its better on the defense side not to have a report because you have to turn it over to the prosecution." (ER 157.)

based on his ignorance of applicable criminal discovery law.[3/]

Dr. Herrmann, a board certified forensic pathologist and Alameda County's medical examiner also testified at the state hearing, and stated that the cause of death was drowning and that there was no evidence of or scientific basis for a finding of death by assisted drowning. Changing the mode of death from undetermined to homicide by assisted drowning was not based on new medical findings supporting such a reclassification..

Glen H. Egstrom, Ph.D., a Professor Emeritus at U.C.L.A. with special expertise in "non-swimmer drownings"was another defense expert not utilized by Braun. Dr. Egstrom vehemently disagreed with the state lifeguard expert's trial testimony that the rescuer usually suffers the injuries. Dr. Egstrom stated: (1) there is no typical drowning; (2) the hypothetical posed to the lifeguard assumed a victim who was conscious and struggling on top of the water (*facts that were contrary to the evidence that the decedent was underwater at the bottom of the pool*); and (3) the retired lifeguard inappropriately used lifeguard standards in evaluating Bohana's acts.

Unlike William Richardson, the prosecution "expert" who never examined the pool, the scene of

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[3/] Braun was also ignorant of the fact, that if he intended to call Baden as a rebuttal witness if he needed him as he initially planned to do, then he would have to inform the prosecution of Baden's oral statements to him in any case regardless of whether he had received a written report. *See Roland v. Superior Court* 124 Cal.App.4th 154 (2004).

the alleged crime,[4] before rendering his "opinion," Dr. Egstrom personally examined the Bohana pool, during the day *and at night at the approximate time of the 911 call.* He found that in fact the coping was *not* rough as Richardson assumed in his testimony. "Rough" coping was a necessary component of Richarson's expert opinion that the body would have scrapings if rescued as described by Bohana.

Further, Richardson's testimony that it would require superhuman strength to move the victim from the body from the pool was patently false. A 130 pound female, such as Ms. Jackson, on the bottom of Bohana's pool, would weigh between 6 to 10 pounds negative.[5] The use of a pool pole as a rescue

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[4] *See* The Adventures of Sherlock Holmes by Arthur Conan Doyle, *The Boscombe Valley Mystery:*

> We were seated at breakfast one morning, my wife and I, when the maid brought in a telegram. It was from Sherlock Holmes...
>
> "Circumstantial evidence is a very tricky thing," answered Holmes thoughtfully. "It may seem to point very straight to one thing, but if you shift your own point of view a little, you may find it pointing in an equally uncompromising manner to something entirely different....
>
> "I have ordered a carriage," said Lestrade as we sat over a cup of tea. "I knew your energetic nature, and that **you would not be happy until you had been on the scene of the crime**."

[5] First, of all, the human body in water is weighed up by a force that is equal to the weight of the water [Archimede's principle]....Under those circumstances that's an easy weight

aid in residential pools is common and the actual poles allegedly used, in evidence at trial, could have moved a body from the bottom of a pool as Bohana described. Dr. Egstrom testified that he had raised an anthropometric dummy weighing about seven pounds negative with a pool leaf basket from the bottom of a pool.

Braun's inexcusable and incompetent failure, in this circumstantial murder case, to present available exculpatory expert testimony based on his incomplete investigation and knowledge of the law on California discovery procedure in a criminal case was not only prejudicial under *Strickland*, it was a travesty that resulted in a miscarriage of justice resulting in erroneous Bohana's conviction for second degree murder.

Petitioner therefore sought a Certificate of Appealability from the Ninth Circuit to appeal the foregoing issues which were explicitly addressed in appellant's opening brief as uncertifed issues.

REASONS FOR GRANTING THE WRIT

Certiorari Should Be Granted and a Certificate of Appealability Issued Because Bohana Met the Criteria for a Certificate of Appealability on the two uncertified issues based on the incompetence of Bohana's trial counsel in rejecting all defense expert forensic witnesses who could have provided exculpatory testimony and corroborated Bohana's version of the events, after counsel was unable to introduce an exonerating polygraph examination of

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to get to the surface."

Bohana, and instead solely relied on his cross-examination of the prosecution's two expert witnesses and Bohana's uncorroborated and poor testimony at trial with counsel compounding his incompetence by relying on the erroneous legal analysis provided by his son, who was studying for the bar examination, and without even verifying his son's advice as to the applicable law on misdemeanor involuntary manslaughter despite evidence suggesting the defense, the court's invitation to so instruct the jury, and the jury's note asking if they could reach a verdict other than second degree murder, thereby invited the error, and making it unreviewable on direct appeal

The totality of counsel's performance constituted ineffective assistance of counsel. Petitioner identified in his opening brief two specific uncertified issues, debatable by reasonable jurists:

1. Trial Counsel's Ineffective Failure to Present Available, Exculpatory Evidence From a Forensic Pathologist and an Aquatics Expert to Rebut the Trial Testimony of the State's Experts and Support the Theory of Defense.

Bohana was convicted as a direct result of expert testimony by prosecution witnesses, David Posey, M.D. ("Posey") and retired lifeguard William Richardson ("Richardson"), which unfathomably, went uncontroverted by the defense. *See People v. Bohana, supra,* at 368. Braun made this case a credibility contest between the state's two and Bohana's personal recollection of the accident. Braun was totally oblivious to the glaring and obvious need to support his client's credibility and to undermine

the state's experts with his own defense experts. Despite having in hand expert contradictory testimony from two eminent independent experts, Braun utterly failed to present any of the available scientific testimony that completely refuted the prosecution experts' opinions.

While an attorney's legal skills may be finely honed for combat in the attorney's own eyes, a diligent advocate must prepare a theory of the case, rather than merely gambling on cross-examination and the client's testimony. "A defendant has no legitimate interest in compelling the jury to adopt an all or nothing approach to the issue of guilt. Our courts are not gambling halls but forums for the discovery of truth." *People v. Martin*, 1 Cal. 3d 524, 533 (1971).

"Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgment supports the limitations on investigation." *Strickland v. Washington*, 466 U.S. 668, 690-91(1984). This includes the duty to pursue evidence that corroborates trial counsel's chosen theory of defense. *Sanders v. Ratelle*, 21 F.3d 1446, 1456-58 (9th Cir. 1994). Counsel has a further duty to obtain and if favorable to present expert opinion supporting defenses. *Smith v. Stewart*, 189 F.3d 1004, 1012 (9th Cir. 1999); *Wallace v. Stewart*, 184 F.3d 1112, 1117 & n. 5 (9th Cir. 1999).

A.. Braun's Failed to Call a Single Forensic Pathologist at Trial.

Braun's defense of Bohana was that: (1) Jackson either passed out, hit her head, or had a

seizure in the swimming pool while intoxicated and after exposure to the heat of the Jacuzzi; and (2) the injuries to her body were the result of Bohana's efforts to bring her out of the pool and rescue her from drowning. *People v. Bohana*, 84 Cal. App.4th at 367. But this defense was incomplete and doomed to failure without supporting defense expert testimony. Defense expert testimony was essential to demonstrating the plausibility of Bohana's recollection; that Jackson's injuries were consistent with Bohana's rescue efforts; that the manner of death of "homicide" by "assisted drowning" was faulty and unsupportable; that Jackson could have lost consciousness from the combination of alcohol and the heat of the Jacuzzi or even just been dizzy and fell into the pool; that the contusion to her head was consistent with hitting her head on the side of the pool; and that Posey's testimony her injuries could not be the result of paramedic intervention was simply erroneous.

1. Failing to Present the Exculpatory Expert Testimony of Forensic Pathologist Dr. Michael Baden.

Bohana paid in advance for expert testimony in his defense and Braun consulted with forensic pathologist, Michael Baden, M.D.[6/] at Bohana's house

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[6/] After receiving his Medical Degree in 1959 from New York University School of Medicine, Dr. Baden interned in New York City hospitals. From 1961 to 1986, Dr. Baden worked in the New York City Office of the Chief Medical Examiner and was the Chief Medical Examiner from 1978 to

prior to trial. Baden examined the autopsy photographs, the setting, and interviewed Bohana. Baden found that: Bohana's rescue account was plausible and consistent with the physical evidence; he could explain the decedent's injuries; and that he disagreed changing the manner of death from "accidental" to "homicide" two years after the autopsy, and flatly contradicted the findings of the prosecution's pathologist, Dr. Posey

The failure to call Baden to present Dr. Baden's favorable expert opinion or any other defense pathologist was egregious, incompetent and lacked any legal justification.

2. Braun Did Not Continue the Investigation with Dr. Baden or Try to Find Another Forensic Pathologist.

1979. He was also the Deputy Chief Medical Examiner for Suffolk County from 1981 to 1983. He has held professorial appointments at Albert Einstein Medical School, Albany Medical College, New York Law School and John Jay College of Criminal Justice. He was the Chairman of the Forensic Pathology Panel of the U.S. Congress Select Committee on assassinations that investigated the deaths of President John F. Kennedy and Dr. Martin Luther King, Jr. Dr. Baden has been involved as an expert in forensic pathology in international cases, including the examination of the remains of Tsar Nicholas of Russia and his family, the death of John Belushi, the autopsy of Medgar Evers, the civil rights leader, the death of Billy Martin, the deaths of Mary Beth Tinning's nine children, the exhumation and autopsy of the five Hoyt children who were murdered by their mother, the re-examination of the Lindbergh kidnapping and murder.

Despite the fact that Dr. Baden had testified in 1000's of cases, including hundreds of high profile cases and in international and congressional commissions, Braun did not regard Baden as a "strong witness" and described him as "very mushy." Braun even went so far as to call him a "defense whore" because he did not provide a detailed explanation as to how the injuries could have been sustained.

Braun stated he wanted to wait and see how the expert cross-examination went before deciding whether to call Baden. Also factored heavily into Braun's stratagem was that Bohana would be an extremely credible witness and would "pull the case together." Braun claimed at the state evidentiary hearing that he got 80% of what he needed during his cross-examination of the state's expert witnesses and therefore decided not to call Dr. Baden or any other expert witnesses to bolster his case.

Despite Dr. Baden's favorable preliminary opinions, Braun stopped any investigation into such evidence after a single meeting with Baden. Braun's minimal contact with Baden – and failure to follow up and ask him specific questions about the injuries at issue or requesting a report – is not an expert consultation that meets the standard of care required of a competent criminal defense attorney in a factually driven complex murder case based almost entirely on forensic evidence, but that of a pre-occupied defense counsel with multiple clients. *Cf. Bloom v. Calderon*, 132 F.3d 1267, 1271, 1278 (9th Cir. 1997) (ineffective assistance in failing to investigate and obtain psychiatric evidence resulted

in a "hurried and inaccurate report" by an expert witness).

Nevertheless, *when Bohana did not live up to Braun's expectations and testified poorly in his defense, Braun still refused to call any expert witnesses, thereby eliminating a second chance at presenting material, relevant and critical exculpatory testimony to the jury.*

Whatever Braun's subjective opinion of Dr. Baden was as a witness, Baden's preliminary findings required Braun to perform his legal duty to conduct further investigation with Baden or another forensic pathologist. Braun, however, did not seek out the opinion of any other forensic experts and in neglecting to doing so he rendered ineffective assistance. In addition, at the state evidentiary hearing on Bohana's habeas petition, Drs. Baden and Herrman, and the prosecution's own pathologist, Dr. Rogers, all refuted and contradicted a majority of the findings expressed by Dr. Posey.

3. Baden's State Hearing Testimony Contradicted Braun's Self Serving Justification in Failing to Call Him as an Expert Witness. Baden Expressed a Sound Expert Opinion That the Drowning Was Accidental.

Baden's expert opinion was that Jackson drowned and the mode of death was *accidental*. The consistency between Bohana's statements and the autopsy findings added to his opinion that this was an *accidental drowning*. Baden emphasized that the

reclassification of the death as homicide *was wrong and unsupported* by the autopsy findings. Baden did not recall Braun ever asking him specific questions as to individual injuries, and "[he]... expected [] to have discussed that later on or go over that prior to testimony of the medical examiner, but that never happened."

Baden found the decedent's injuries to be slight, with the breast injuries were many days old. Posey's testimony that these were all fresh injuries was completely wrong; only two of the microscopic sections (tongue and scalp) were fresh

Since most drowning accidents involve intoxicated persons, the decedent's .22 blood alcohol level was extremely significant. At that high level a person not only has an impaired reserve of oxygen, but is much more likely to lose consciousness faster when oxygen is cut off than a sober person. Hence, her high blood alcohol level would have a significant impact on when and how she lost consciousness. Posey himself testified that a combination of Tylenol-PM and alcohol with a .22 blood alcohol level could have a *synergistic effect that would be the equivalent of a .44 blood alcohol level.*

Posey's trial testimony that there was a laceration to the decedent's tongue was false. The autopsy photographs controverted Posey's finding of numerous lacerations and contusions of the lips. The lower lip abrasions could have been caused by CPR intubation. These injuries were not caused by a blow. Baden had seen other bodies in conducting autopsies where pool skimmers were used to attempt a rescue and these bodies were bruised. It is not necessary

that there be marks on the decedent's back in order for Bohana to have used the pole as described. Posey's conclusion that the injuries to the back of decedent's arm indicated there was an altercation simply stretched forensic pathology beyond its limits.

4. Dr. Herrmann's State Hearing Testimony[7/]

Dr. Herrmann, a professor at the Stanford University School of Medicine and the Alameda County medical examiner testified at the state hearing. He stated that Posey's four-hour trial testimony regarding bruising was not scientifically supportable and Posey misapplied medical principles regarding the healing of wounds that involve a break in the skin to wounds that do not involve a break in the skin, i.e., bruises.

Herrmann controverted Posey's trial testimony that none of the marks on the decedent's body resulted from paramedic intervention. The abrasions and other marks were not from a blow, but could have occurred during revival efforts or intubation. Defibrillator paddles fully explained the marks on the chest.

Herrmann concurred with Baden, that Jackson's .22 blood alcohol level was extremely significant because alcohol is a major contributor to drowning. It clouds judgment, causes a person to

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[7/] Dr. Herrmann conducted 12,000 to 13,000 autopsies during his professional career and *sees approximately 20 drowning cases annually.*

take chances they would not otherwise take, and causes falls and other injuries. It was especially key that Jackson was in the Jacuzzi prior to going in the pool. A Jacuzzi can be lethal to intoxicated persons. He could not rule out blood flow disturbance as causing her to pass out while swimming.

C. Failure to Present Expert Testimony of Glen Egstrom, Ph.D., to Rebut the Testimony of Retired Lifeguard Richardson

Dr. Egstrom, a Professor Emeritus at U.C.L.A. and a Diving Safety Officer for the Los Angeles County Sheriff' Department, refuted Richardson's trial testimony. Braun's failure to call Dr. Egstrom at trial is also inexplicable. *See, e.g., Steidl v. Walls,* 267 F.Supp.2d 919, 936, 938 & n. 5 (C.D. Ill. 2003). Richardson, a retired "lifeguard" from Huntington Beach, California, gave unrebutted testimony at the trial that Ms. Jackson was not rescued as Bohana described because (1) Bohana, not Ms. Jackson, should have had scratches on his body and (2) Bohana's method rescue would have left scrapes and bumps on her hips from being dragged over the "rough" coping of the pool.

However, neither Posey nor Richardson ever visited the crime scene and examined the pool. Richardson opined that Ms. Jackson was not recovered from the pool as described by Bohana, but he did not put forth a theory of how she got out of the pool. Indeed, Richardson erroneously testified that it

would require "superhuman" strength to move Ms. Jackson from the bottom of the pool.

The feasibility of Bohana's rescue efforts was critical to the prosecution's case. Nevertheless, Braun presented no expert or other evidence to contradict Richardson's opinion or even inquired if Richardson had examined the pool's coping. The prosecution later exploited Richardson's testimony in repeatedly asserting during closing arguments that Richardson's uncontradicted expert testimony established Bohana's guilt.

Braun also did not even elicit the fact that Richardson never visited the "crime" scene, examined the condition of the pool, the coping and its depth, or conducted any experiments to determine how much strength it took to get an unconscious swimmer to the surface using a pool skimmer.

Mr. Arnold, who testified for the prosecution at the state hearing, had "a Ph.D. in U.S. history" but whose "background is all lifeguard," was a also a beach lifeguard, who based his opinion on the fact that Bohana had completed a one mile swim some 20 years earlier. He also had not examined the crime scene or the pool.

D. Braun's State Hearing Testimony Did Not Support a Reasonable Tactical Choice in Not Calling the Defense Experts in His Case in Chief or in Rebuttal.

Braun confirmed the meeting Bohana's house prior to trial and admitted Baden told him that he

could explain the decedent's injuries and that he disagreed with the coroner reclassifying the manner of death two years after the autopsy.

Braun later decided it was too risky to call Baden because he thought he had gotten what he needed from Posey. Believing that Bohana would do well as a witness and could "pull the case together," factored heavily into Braun's decision not to use any expert witnesses prior to bohana's testimony . W*hen Bohana did not live up to his expectations and testified poorly, Braun still refused to call any expert witnesses, thereby eliminating petitioner's second chance to present material, relevant and critical exculpatory testimony to the jury to corroborate his testimony and the defense theory of the case.*

2. Trial Counsel Was Ineffective in Failing to Request an Involuntary Manslaughter Instruction Based on His Mistake of Law Regarding This Lesser Included Offense

Braun was without a doubt ineffective because he failed to request an involuntary manslaughter jury instruction based on a lack of legal research and his reliance on his son's erroneous belief, who was studying for the bar exam, that battery could not be a predicate offense for involuntary manslaughter.

A. Misdemeanor Involuntary Manslaughter

At the time of Bohana's trial, a death resulting from a misdemeanor battery constituted the crime of involuntary manslaughter and is a lesser included

offense of murder. *People v. Clark,* 130 Cal. App. 3d 371(1982); *People v. Prettyman*, 14 Cal. 4th 248, 274 (1996). Braun admitted in open court that he had "totally forgotten" about misdemeanor involuntary manslaughter as a defense to murder. Nevertheless, Braun opposed any jury instruction on the lesser included offense of involuntary manslaughter. Braun stated the evidence would not support that theory "because you have the prosecution's position, then you have the defense's position that he didn't commit any battery. He didn't have a fight.

Disagreeing, the trial judge pointed out that it was the court's duty to instruct on lesser included offenses "sua sponte, not just on your request." A manslaughter instruction was required, the court explained, because the coroner testified "that it was a beating" which raised the question "whether there was an argument or not . . . ." A manslaughter instruction was necessary because the jury could find Bohana committed a battery and that Jackson's death arose from conduct without "due caution and circumspection."

While Braun argued that neither party was relying on those theories, the trial court repeated its recognition that "the court has to give all of those possible instructions; otherwise it's error if it's not given." Ultimately, the prosecution concurred with the court's analysis that the involuntary manslaughter instruction ought to be given.

Braun compounded his lack of investigation and the failure to call any defense witnesses to corroborate's Bohanna's defense with the monumental absurdity of his legal research, which

was based on his son's erroneous statement to him the night before that a misdemeanor battery could not be the basis for involuntary manslaughter. Braun's son was a third year law student.

Braun solidified this error when prior to trial the next morning, Braun did not even bother to put in a cell-phone call to any licensed fellow attorney on his way to court to confirm or otherwise verify this non-existent rule of law that was absolutely critical to Bohana's defense, before presenting it to the trial court as the basis for his objection. Reluctantly, and erroneously, the trial court acquiesced to Braun's vigorous and equally erroneous objection, thereby inviting error on the court's failure to give the jury instruction on direct appeal.

The jury, however, had a more common sense approach. On the second day of deliberations, they submitted to the court two questions: "Can there be another ruling? - Re: Provocation to be sufficient to reduce the homicide to Manslaughter. Are guilty in the first or second degree or not guilty our only options?"[4/]

Based on Braun's objections, the court instructed the jury that "[p]rovocation could be used only to determine the degree of the crime. [¶] See 8.73." To the jury's second question that they had only two choices, the court responded "Yes." Only two

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[4/] The package of instructions submitted to the jury inadvertently included an instruction concerning manslaughter. (*Id.* at 564).

and half hours after the court's supplemental instructions, the jury reached a verdict.

Braun acted without an accurate knowledge of the law and the evidence – based on the clearly erroneous and unethical legal advice from his son in objecting to instructions on lesser included offenses.

Counsel's other alleged justification for not requesting an involuntary manslaughter instruction was "tactical reason" – a "tactic" does not "automatically immunize an attorney's performance from Sixth Amendment challenges." This tactical decision, not agreed to by Bohana was driven by and based on a fundamental and unforgivable mistake of law, and is therefore constitutionally unacceptable as a justification for counsel's incompetence.

B. Bohana Was Severely Prejudiced by Braun's Errors Under *Strickland*

After Braun articulated a legally erroneous basis for his objection, the trial court abandoned its correct legal analysis. The record clearly shows that but for Braun's monumental error of law, the trial judge would have given involuntary manslaughter instructions. (*Id.*, at 1842) There is a "reasonable probability" that had the jury been properly instructed, Bohana would have been convicted of involuntary manslaughter, not second degree murder.

It is clear from the jury's note inquiry and its subsequent swift verdict once the jurors were informed that manslaughter was not an available option, that they would have seriously considered an

alternate finding between a guilty verdict and acquittal on second degree murder. The jury's questions also suggest that the jurors were not prepared to accept Bohana's testimony and acquit him on that basis alone.

Similarly, the jurors reasonably could have concluded that at least some of Ms. Jackson's injuries resulted from an altercation between her and Bohana and that as a consequence, she ended up drowning in the pool. It seemed especially likely that the jurors entertained this perspective or some variant of it.

Relying both on Posey's testimony and their own experience as to the likely effect of consuming ten or eleven alcoholic drinks, the jurors could have inferred that Jackson's degree of intoxication was a substantial contributing cause to any conflict and to how it ran its tragic course. Certainly it would not have been outside the realm of human experience that, at such a high level of inebriation, an intoxicated person caught up in an altercation would suddenly lose her balance, fall into the pool, and drown.

The case for conviction of involuntary manslaughter was credible and readily supported by the evidence. The trial judge initially perceived and the prosecution agreed that involuntary manslaughter was a lesser-included offense supported by the evidence. What derailed the process was Bohana's own counsel.

The jury reasonably could have inferred that Jackson went into the pool, and ultimately drowned, as a result of criminal negligence or battery, even if Bohana did not intend her death. That theory, far

more than any argued by the prosecution in support of murder, is the most reasonable explanation permitted on the record. It is reasonably probable that a jury would have returned a verdict reflecting involuntary manslaughter had Braun not convinced the court to commit an error of law. An involuntary manslaughter defense carries a 2, 3, 4 year term. California Penal Code § 193(b). For second degree murder, Bohana was sentenced to an indeterminate term of imprisonment for 15 years to life.

C. Cumulative error

Finally, Braun's cumulative errors were beyond peradventure ineffective assistance of counsel under the Sixth Amendment and were blatantly prejudicial to Mr. Bohana's defense. Counsel was more than asleep at the wheel; he actively undermined his own client's defense by failing to present exculpatory testimony and evidence through expert witnesses. Braun's rolling of the dice on an "all or nothing" defense without the client's informed consent and without the necessary evidence to support such a gamble after Bohana's testimony failed to pull the case together as Braun expected, coupled with Braun's absurd and legally unjustifiable reliance on a layperson's assertion of a fictitious legal rule during a conversation without any attempt to verify same before using it in court as the basis for rejecting a clearly warranted and sustainable defense based on the actual facts adduced at trial.

As a direct result of these so-called "tactical" blunders and Braun's obviously deficient trial

"strategy," the prosecutor obtained a second degree murder conviction. In fact, it was the affirmative scientific evidence supporting the defense that the jury was seeking and precisely *what available defense experts were ready to provide.* At trial, the prosecutor's rebuttal argument was a veritable litany of complaints regarding the lack of any scientific evidence corroborating Bohana's testimony. *Turner v. Duncan*, 158 F.3d at 458 & n.12 (prosecutor's emphasis on the defense's failure to corroborate key facts is a relevant consideration in the prejudice inquiry of the defense). *Cf. Bloom v. Calderon*, 132 F. 3d at 1275, 1277-78 (counsel's failure to present psychiatric expert evidence to bolster a heat of passion defense was prejudicial despite "strong evidence suggesting premeditation").

The prosecution presented no "strong evidence" of implied malice or causation. Braun failed to adequately investigate, "and to introduce . . . evidence that demonstrate[d] his client's factual innocence or that raise[d] sufficient doubt as to that question to undermine confidence in the verdict" and therefore "rendere[d] deficient performance. *Avila v. Galaza*, 297 F. 3d 911, 919 (9th Cir. 2002). *See also Riley v. Payne*, 352 F. 3d 1313, 1320 (9th Cir. 2003). Braun's supercilious protestations that his general approach is to get his defense case out of the prosecution's witnesses mouths, may be justifiable in the abstract, but it certainly does not apply in a complex circumstantial drowning case where there were expert witnesses who were ready, willing and able to give exculpatory testimony on Bohana's behalf, based on their own independent and

scientifically sound investigations of the evidence and the crime scene.

As this Court has stated, in *Miller-El v. Cockrell*, 537 U.S. 322, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003), a COA will issue if the petitioner presents a denial of a substantial constitutional right, and the standard is whether the denial is debatable amongst reasonable jurists.

> [A] prisoner seeking a COA need only demonstrate 'a substantial showing of the denial of a constitutional right.' A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.

Miller-El I, 537 U.S. at 327, 123 S.Ct. 1029 (citations omitted); *see also Slack v. McDaniel,* 529 U.S. 473, 483, 120 S.Ct. 1595 (2000).

> "[W]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straight-forward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong."

Miller-El I, 537 U.S. at 338, 123 S.Ct. 1029 (citations omitted.)

Petitioner has clearly met this standard on the two uncertified issues presented in his Opening Brief in the Ninth Circuit.

CONCLUSION

Petitioner submits that he has identified two substantial constitutional questions debatable among reasonable jurists and his motion to expand the COA should have been granted by the Ninth Circuit. This Court should direct the Ninth circuit to expand the COA to include the two uncertified issues.

Dated: January 6, 2011

Respectfully submitted,

ROBERT J. WATERS
Counsel of Record

APPENDIX A

NO. 08-56855

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DONALD JAMES BOHANA, Petitioner-Appellant,

vs.

TOM E. VAUGHN, WARDEN, and JEANNE S. WOODFORD, DIRECTOR OF CALIFORNIA DEPARTMENT OF CORRECTIONS, Respondents-Appellees.

MEMORANDUM*

FILED: July 22, 2010

Appeal from the United States District Court
for the Central District of California
A. Howard Matz, District Judge, Presiding

Submitted July 12, 2010**
Pasadena, California

Before: FARRIS, HALL and SILVERMAN, Circuit Judges.

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*This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

**The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Donald J. Bohana appeals the district court's denial of his 28 U.S.C. § 2254 petition. Bohana was convicted of second degree murder in California state court. We have jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253. We affirm the district court and decline to expand the certificate of appealability.

We review de novo a district court's denial of a habeas petition. *Mendez v. Knowles,* 556 F.3d 757, 767 (9th Cir. 2009). We must deny the petition unless the state court's decision was "either (1) contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the Untied States, or (2) based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Id.*

Bohana argues that his trial counsel provided ineffective assistance. To show ineffective assistance of counsel, the defendant must first show that counsel's performance was deficient and that it prejudiced the defense . *Strickland v. Washington,* 466 US. 668, 687 (1984). Deficient performance is when "counsel's trial performance [is] objectively unreasonable 'under prevailing professional norms' and under 'all the circumstances' of the particular case." *Pinholster v. Ayers,* 590 F.3d 651, 664 (9th Cir. 2009) (en banc) (quoting *Strickland,* 466 U.S. at 687-88).

Bohana argues that his trial counsel, Mr. Braun, was deficient for failing to investigate alternative defenses and for failing to inform and advise him of the alternative defenses. We have held that "defense counsel must, at a minimum, *conduct a*

reasonable investigation enabling him to make informed decisions about how best to represent his client.'" *Rios v. Rocha*, 299 F.3d 796, 805 (9th Cir. 2002) (quoting *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994)) (emphasis in original). "A defense attorney's failure to consider alternate defenses constitutes deficient performance when the attorney neither conducts a reasonable investigation nor makes a showing of strategic reasons for failing to do so." *Id.* (quotation marks and citation omitted). However, "[o]nce counsel reasonably selects a defense, it is not deficient performance to fail to pursue alternative defenses." *Id.* at 807 (citation omitted).

Braun's performance was not deficient. In previous cases where we found counsel ineffective for failing to investigate and present alternative defenses, the defenses selected were not viable and there were multiple witnesses that counsel failed to investigate who would have easily yielded contradictory evidence to the selected defenses. *See Johnson v. Baldwin*, 114 F.3d 835, 839 (9th Cir. 1997); *Phillips v. Woodford*, 267 F.3d 966, 978 (9th Cir. 2001); *Rios*, 299 F.3d at 806; *Sanders*, 21 F.3d at 1455. Here, there were no witnesses that Braun could have interviewed who would have contradicted Bohana's story. Braun read the police reports, discussed with Bohana his version of the events, and also discussed the plausibility of Bohana's story with two experts, Drs. Baden and Egstrom. As Braun aptly pointed out at the state evidentiary hearing, Bohana's story to him was similar to Bohana's story to the police. Braun's

consultation with Dr. Baden was consistent with Bohana's story. Given Bohana's insistence that he had not committed any wrongdoing, it was reasonable for Braun to believe Bohana's story and use it. *See Bean v. Calderon,* 163 F.3d 1073, 1082-83 (9th Cir. 1998). Furthermore, the viability of the defense selected bears on the reasonableness of counsel's actions. *Turk v. White,* 116 F.3d 1264, 1267 (9th Cir. 1997). Braun's selected defense was strong and not "incredibly lame." *See Johnson,* 114 F.3d at 838.

Bohana's contention that he was not consulted about any alternative defense is in conflict with the record. Braun did consult with Bohana about the alternate defense of manslaughter based on an altercation theory. Bohana rejected approaching the prosecution with a manslaughter plea. He consistently maintained that it had been a rescue situation and he was innocent. Braun reasonably chose to present the rescue defense . As there was no deficient performance, we need not consider the prejudice prong.

Bohana seeks to expand the certificate of appealability to include two uncertified issues. To expand a COA "[a] habeas petitioner's assertion of a claim must make a substantial showing of the denial of a constitutional right." *Mendez,* 556 F.3d at 770 (quotation marks and citation omitted). Bohana has not done this. Trial counsel's decisions not to call the experts to testify and not to seek a involuntary manslaughter jury instruction were both strategic choices, which are "virtually unchallengeable." *Strickland,* 466 U.S. at 690.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE

CENTRAL DISTRICT OF CALIFORNIA

DONALD JAMES BOHANA, Petitioner,

vs.

TOM E. VAUGHN, WARDEN, et al., Respondents.

CASE NO. CV 04-3037-AHM (MAN)

FILED: October 15, 2008

JUDGMENT

Pursuant to the Court's Order Accepting and Adopting Findings, Conclusions and Recommendations of United States Magistrate Judge,

IT IS ADJUDGED that this action is dismissed with prejudice.

DATED: October 14, 2080

/s/
A. Howard Matz
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

DONALD JAMES BOHANA, Petitioner,

vs.

TOM E. VAUGHN, WARDEN, et al., Respondents.

CASE NO. CV 04-3037-AHM (MAN)

FILED: October 14, 2008

ORDER ACCEPTING AND ADOPTING FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, all of the records herein, the Report and Recommendation of United States Magistrate Judge, and Petitioner's Objections to Report and Recommendation ("Objections"). The Court has conducted a *de novo* review of those matters to which objections have been asserted.

The Court has considered Petitioner's arguments set forth in the Objections and does not find them persuasive. with respect to Petitioner's sufficiency of the evidence claim in Ground One, as long as there was evidence in the record enabling a rational trier of fact to find the elements of second degree murder

under a theory consistent with the jury instructions, it is irrelevant whether the prosecutor also argued theories not supported by the evidence. *See Griffin v. United States*, 502 U.S. 46, 56, 112 S. Ct. 466, 472 (1991) (a general verdict will not be set aside merely because "one of the possible bases of conviction was ... unsupported by sufficient evidence") .

Petitioner argues that an unreasonable inference -- that the victim would not have gone to the deep end of the pool of her own free will – is the foundation for the Magistrate Judge's conclusion that the evidence was sufficient to enable a rational jury to find that Petitioner "beat [the victim] and forced her into the deep end of the pool, knowing that she could not swim and would drown." (Objections at 18-19; Report and Recommendation at 31.) However, while the victim's family and friends testified that, in the months before her death, she had overcome her substantial fear of swimming pools and expressed a willingness to enter a pool and learn to swim, there was *no* evidence, other than Petitioner's own testimony, that anyone had ever seen her voluntarily enter the *deep* end of a pool. (*See* Objections at 17-19; Report and Recommendation at 14-16, 31-32.) Thus, Petitioner's argument cannot be squared with clearly established Supreme Court law requiring the reviewing court to consider all conflicts in the evidence in the light most favorable to the prosecution. *See Jackson v. Virginia*, 443 U.S. 307, 326, 99 S. Ct. 2781, 2793 (1979).

Regarding Petitioner's ineffective assistance of counsel claim in Ground Two, Petitioner argues that he was prejudiced by defense counsel's decision not to call a forensic pathologist. Objections at 61-64.) However, the Report and Recommendation does not

rest its conclusion that defense counsel was not ineffective on the prejudice prong of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). Rather, the Magistrate Judge expressly stated that, because Petitioner's ineffective assistance claim failed under the deficient performance prong of *Strickland*, she would not consider the prejudice prong.[1/] (Report and Recommendation at 45 n.11.)

Moreover, in his declaration and testimony at the state court evidentiary hearing, defense counsel set forth his reasons for not calling expert witnesses, and the state court found them reasonable. Despite Petitioner's vigorous attempt to demonstrate the ways in which defense experts would have provided helpful testimony, he has not overcome the presumption that defense counsel's decision to try to undermine the testimony of the state's experts through cross-examination, rather than present competing testimony by defense experts, was within the scope of reasonable professional assistance. *Strickland*, 466 U. S. at 689, 104 S. Ct. at 2065.

Petitioner complains that, although defense counsel testified that he decided not to call expert witnesses in part because he expected Petitioner's testimony to "pull the case together," this rationale

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1The Court notes that Petitioner's lengthy Objections rely on matters not pertinent to Magistrate Judge's findings and conclusions. Thus, Petitioner argues that defense counsel's purported errors were prejudicial, even though the Magistrate Judge based her conclusion that counsel was not ineffective solely on the deficient performance prong of *Strickland*, and argues that the state court erroneously characterized certain trial testimony, even though the analysis in the Report and Recommendation did not rely on that testimony. (See Objections at 31-33, 61-63, 76-82, Report and Recommendation at 30-31, 45 n.11, 60 n.16.)

was not viable after counsel saw that Petitioner was not a good witness. (Objections at 54.) Defense counsel's decision not to call expert witnesses, however, did not rest only on his belief that Petitioner would be a good witness. Thus, defense counsel cannot be deemed ineffective merely because he did not modify his strategy after that belief proved erroneous.

Similarly, Petitioner argues that he was prejudiced by defense counsel's decision not to request an involuntary manslaughter instruction, because the trial court was willing to give such an instruction and the note submitted by the jury to the trial court indicated the jury's willingness to consider a manslaughter verdict. (Objections at 77.) Once again, the Report and Recommendation rejected Petitioner's ineffective assistance claim based solely on the deficient performance prong of *Strickland*; the prejudice prong was not reached. (Report and Recommendation at 60 n.16.) Defense counsel's admittedly risky strategy of presenting the jury with an all-or-nothing choice between a murder verdict, if it accepted the prosecution's version of the events, or an acquittal, if it accepted Petitioner's version of events, was objectively reasonable, especially since an involuntary manslaughter theory was inconsistent with Petitioner's version of the events as provided by his testimony.

In the portion of his Objections challenging the conclusions of the Report and Recommendation with respect to Grounds Four and Five, Petitioner argues that the Magistrate Judge found tactical reasons for defense counsel's failure to object and other omissions, although there is "no evidence as to trial counsel's thought processes." (Objections at 96.) It is

settled law that the Court need not determine the actual reason for an attorney's actions, as long as they were reasonable. *Morris v. California*, 966 F.2d 448, 456 (9th Cir. 1991); *United States v. Molina*, 934 F.2d 1440, 1448 (9th Cir. 1991).

Petitioner argues that, under *Alcala v. Woodford*, 334 F. 3d 862 (9th Cir. 2003), the court "may not find a strategic basis for counsel's actions in the absence of evidence." (Objections at 86.) *Alcala* is inapposite. In that case, the Ninth Circuit found that counsel was ineffective when he presented an alibi defense but failed to call the only witness able to testify regarding the specific date and time of the alibi. Counsel did not recall why he decided not to call the witness.

The Ninth Circuit rejected the state's argument that counsel may have been motivated by the witness's initial equivocation regarding the petitioner's arrival time, because "it would have us find a strategic basis for trial counsel's actions in the absence of evidence," and also because such a rationale was inconsistent with other evidence showing that the witness's testimony would still have been useful. *Alcala*, 334 F.3d at 870-01. This is a far different situation than that presented here, where the issue is defense counsel's decision not to object during closing argument, or not to advise Petitioner to pursue a defense that would have depended on a version of events inconsistent with Petitioner's version.

Having carefully considered each of Petitioner's Objections, the Court accepts and adopts the Magistrate Judge's Report and Recommendation and the findings of fact, conclusions of law, and recommendations therein.

IT IS ORDERED that: (1) the Petition is DENIED; and (2) Judgment shall be entered dismissing this action with prejudice.

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order and the Judgment on counsel for Petitioner and counsel for Respondents.

DATED: October 14, 2008

/s/
A. Howard Matz
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

DONALD JAMES BOHANA, Petitioner,

vs.

TOM E. VAUGHN, WARDEN, et al., Respondents.

CASE NO. CV 04-3037-AHM (MAN)

FILED: January 6, 2009

ORDER PARTLY GRANTING CERTIFICATE OF APPEALABILITY

On November 12, 2008, Petitioner filed a Notice of Appeal, by which he seeks to appeal the Court's Judgment, entered on October 15, 2008, denying habeas relief and dismissing this action with prejudice. On November 26, 2008, the Court granted Petitioner's ex parte application for an extension of time to file an application for a certificate. of appealability ("COA"). On December 23, 2008, Petitioner filed an application for a COA.

Under 28 U.S.C. § 2253(c) (1) (A), an appeal may not be taken from a "final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court" unless the appellant first obtains a COA. "A certificate of appealability may issue only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c) (2). In *Slack*

v. McDaniel, 529 U.S. 473, 120 S. Ct. 1595 (2000), the Supreme Court clarified the showing required to satisfy Section 2253 (c) (2) and to warrant issuance of a COA when, as in this case, a habeas petition has been denied on the merits:

> To obtain a COA under § 2253(c), a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that, under Barefoot [*Barefoot v. Estelle*, 463 U.S. 880, 103 S. Ct. 3383 (1983)],includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that issues were "'adequate to deserve encouragement to proceed further.'" [cit. om.]

529 U.S. at 483-84, 120 S. Ct. at 1603-04. See also *Miller-El v. Cockrell*, 537 U.S. 322, 327, 123 S.Ct. 1029, 1034 (2003) (a petitioner satisfies Section 2253(c) (2) "by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further") .

In this case, Petitioner alleged five habeas claims in his petition: the first claim challenging the sufficiency of the evidence to support his second degree murder conviction; and the second through fifth claims alleging that Petitioner's counsel at trial provided ineffective assistance in various respects. The United States Magistrate Judge concluded that federal habeas relief was not warranted for any of the five claims under the governing standard of review (28U.S.C. § 2254(d). Petitioner filed lengthy Objections, which the Court carefully considered

pursuant to its *de novo* review. By Order of October 14, 2008, the Court addressed certain of Petitioner's objections expressly and adopted the findings and conclusions set forth in the Report and Recommendation.

By his present Application, Petitioner seeks a COA on all five claims alleged in his habeas petition. The Court has carefully considered the arguments set forth in the COA application, which restate Petitioner's previously-considered Objections to a substantial degree. Having done so, the Court remains satisfied that, with respect to Grounds One through Four of the petition, the resolution of these claims was correct. The Court concludes that: under the governing Section 2254 (d) standard of review, reasonable jurists would not find its resolution of Petitioner's first through fourth claims to be "debatable or wrong"; and the issues raised by Petitioner through these claims are not "adequate to deserve encouragement to proceed further." *Slack*, 529 U.S. at 484, 120 S. Ct. at 1603. Accordingly, a COA is not warranted for Grounds One through Four.

The Court recognizes, however, that the questions raised by Ground Five[2/] involve a closer call. Although the Court believes its decision that the section 2254 standard has not been satisfied with respect to this claim is correct, the Court recognizes that it is possible reasonable jurists could debate the manner in which the claim was resolved or whether

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2 By Ground Five, Petitioner alleged that his counsel at trial provided ineffective assistance, because counsel failed to adequately inform and advise Petition about alternative defenses to the murder

it presented issues that warrant further proceedings. See *Slack*, 529 U.S. at 483, 120 S. Ct. at 1603. Accordingly, the Court concludes that the issuance of a COA for Ground Five of the petition is warranted. Pursuant to 28 U.S.C. § 2253(c) (2), the Application for a COA is GRANTED with respect to Ground Five of the petition. For the reasons set forth above, the Application for a COA is DENIED with respect to Grounds One through Four of the petition.

IT IS SO ORDERED.

DATED: January 6, 2009

/s/
A. HOWARD MATZ
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

DONALD JAMES BOHANA,Petitioner,

vs.

TOM E. VAUGHN, WARDEN, et al., Respondents

CASE NO. CV 04-3037-AHM (MAN)

FILED: February 2, 2008

REPORT AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable A. Howard Matz, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order No. 05-07 of the United States District Court for the Central District of California.

INTRODUCTION

Petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on April 29, 2004 ("Petition"). Respondent filed a Return, and Petitioner filed a Traverse. The matter is submitted and ready for decision.

PRIOR PROCEEDINGS

On July 2, 1998, a Los Angeles County Superior

Court jury found Petitioner guilty of second degree murder in violation of California Penal Code § 187(a). (3 Clerk's Transcript ("CT") 620.) On November 23, 1998, the trial court sentenced Petitioner to 15 years to life in state prison. (3 CT 668.)

Petitioner appealed. (Return, Ex. C.) On October 25, 2000, the California Court of Appeal issued an unpublished decision affirming Petitioner's conviction. (Return, Ex. D.) Petitioner filed a petition for review in the California Supreme Court. (Return, Ex. E.) On February 14, 2001, the California Supreme Court denied the petition. (See Return, Ex. F.)

On January 8, 2002, Petitioner filed a habeas petition in the Los Angeles County Superior Court (Case No. BA109446). (Return, Ex. G.) On February 5, 2002, the Superior Court denied the petition. (Return, Ex. H.)

Petitioner then filed a habeas petition in the California Court of Appeal (Case No. B156656). (Return, Ex. I.) On April 24, 2002, the California Court of Appeal summarily denied the petition. (Return, Ex. J.) Petitioner filed a petition for review in the California Supreme Court. (Return, Ex. K.) On July 17, 2002, the California Supreme Court granted the petition for review and transferred the case to the California Court of Appeal, with directions to issue an order to show cause, returnable before the Los Angeles County Superior Court, with respect to two of Petitioner's ineffective assistance of counsel claims. (Return, Ex. L.)

On July 31, 2002, the California Court of Appeal issued an order to show cause regarding whether defense counsel rendered ineffective assistance by failing to: (1) call experts to testify at trial; and (2)

request instructions on involuntary manslaughter. (Return, Ex. M.) Respondent then filed a return to Petitioner's habeas petition in Case No. BA109446 in the Los Angeles County Superior Court and Petitioner filed a traverse. (Return, Ex. N; Traverse, Ex. B.) The Superior Court held an evidentiary hearing, which took place on July 21, 2003, July 22, 2003, and August 6, 2003. (Return, Ex. O [Evidentiary Hearing Transcript ("EHT")].) On October 10, 2003, the Superior Court rejected Petitioner's ineffective assistance claims and denied the habeas petition. (Return, Ex. P [Transcript of Hearing on October 10, 2003] at 2329; Ex. Q [minute order dated October 10, 2003].)

Petitioner then filed a second habeas petition in the California Court of Appeal (Case No. B172046). (Return, Ex. R.) On February 11, 2004, the California Court of Appeal summarily denied the habeas petition, with one justice stating that he believed it appropriate to issue an order to show cause with respect to the involuntary manslaughter issue. (Return, Ex. S.) Petitioner filed a petition for review in the California Supreme Court. (Return, Ex. T.) On April 21, 2004, the California Supreme Court summarily denied the petition, with one justice opining that review should be granted. (Return, Ex. U.)

Petitioner then filed this Petition.

SUMMARY OF EVIDENCE AT TRIAL

I. PROSECUTION EVIDENCE

In the summer of 1994, Petitioner was dating Delores "Dee-Dee" Jackson ("Jackson"). (4 Reporter's

Transcript ["RT"] 709-10; 6 RT 1134.) Jackson had previously been married to Tito Jackson, and they had three sons, Tariano ("Taj"), Tarryl, and Tito Joe ("T.J."). (7 RT 1232.)

On August 26, 1994, Jackson worked for David Gest as his personal assistant. (7 RT 1344, 1403.) Later that day, she took T.J. and Taj to a doctor's appointment and returned to work at Gest's house. (7 RT 1344, 1362-63, 1404.) She left his residence after dinner at about
10:25 p.m. (7 RT 1403, 1405.) She called Taj to tell him that she might stay the night at Petitioner's house. (7 RT 1363.)

During the night, Petitioner left a message on Taj's answering machine: "Are you there? Are you there? . . . Pick up." (7 RT 136364.) Petitioner had never called Taj before. (7 RT 1364.) Taj did not recognize the voice and did not pick up. (7 RT 1362, 1364.)

Petitioner's ex-wife, Sheila Bohana, and their older daughter, Donna Bohana, received telephone calls from Petitioner sometime between midnight and 12:45 a.m. (4 RT 547, 548, 570, 571.) Their conversations were principally with Jackson, who was coordinating the arrangements for Donna Bohana's upcoming wedding. (4 RT 547-48, 553, 572, 599.) The wedding was set for September 2, 1994, and the bridal shower was to be given by Jackson at Petitioner's house on August 28, 1994. (4 RT 547, 549.) Petitioner and Jackson appeared to be in a good mood. (4 RT 548, 573.)

In the early morning hours of August 27, 1994, at 3:34 a.m., Petitioner called the "911" operator and said that "someone fell in my pool" and was drowning. (2 RT 287-88; 3 CT 530.) He gave the

address as "6432 Holt," but the dispatcher who took the call directed the Los Angeles County Fire Department paramedics to "6433 Holt" in Ladera Heights, the address associated with Petitioner's telephone number. (2 RT 288; 3 CT 530-31.)

Los Angeles County Fire Department paramedics Eudell Lee Cunningham, Joseph Coffey, and Michael Williams arrived at Petitioner's residence at 3:42 a.m. (2 RT 304; 3 RT 363, 480, 482.) Because they received no response at the front door, they entered the back yard by jumping over the fence. (2 RT 310-12; 3 RT 368-69, 483-85.) They saw Jackson lying on the ground and Petitioner kneeling near her, making up and down movements that looked like compressions or CPR. (2 RT 317-18.) Both were nude. (2 RT 318; 3 RT 375.) Jackson was lying down with her back and neck propped up against a tree and her chin down towards her chest. (2 RT 318; 3 RT 373-74, 485-86.) The ground under Jackson was wet, but her skin was not wet and her hair was only damp.[1/] (2 RT 318; 3 RT 383-84.) She was not breathing. (2 RT 320; 3 RT 376.)

The paramedics moved Jackson to a dry area and initiated CPR compressions. (2 RT 321-22; 3 RT 381.) With the first compression, Jackson expelled a large amount of liquid smelling strongly of alcohol. (3 RT 400-02.) After two or three compressions, the paramedics used a bag valve mask and intubated her. (2 RT 322-23, 325-26.) They used a fibrillator in

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1 Amy Winer, Jackson's friend and hairdresser, testified that Jackson's hair was very porous and would take several hours to dry naturally. (7 RT 1274-75.)

an attempt to restart Jackson's heart, which was in ventricular fibrillation, that is, it was quivering but not pumping blood. (3 RT 377-78.) The paramedics noticed that Jackson had numerous bruises on her upper chest and breasts, a torn earlobe, and a laceration to the shoulder. (3 RT 397.) Their efforts to revive her were unsuccessful; she was transported to a hospital and pronounced dead at 4:36 a.m. (3 RT 456-58, 464.)

While the paramedics were attempting to revive Jackson, Petitioner went into the house to get dressed and then returned and watched them. (2 RT 330-31.) At about 3:55 a.m., he called Sheila Bohana. (4 RT 574.) He told her to come quickly because Jackson was drowning, and then he hung up. (4 RT 574-75.) He sounded hysterical and his voice shook. (4 RT 574-75.) She tried to call him back, but the line was busy. (4 RT 577.)

When paramedic Williams asked Petitioner about Jackson's name, age, and medical history, Petitioner merely said that her name was "Dee-Dee" and did not answer further questions, instead staring blankly ahead. (3 RT 487-92, 498, 500, 509-10.) Coffey testified that Petitioner said he did not know how Jackson got into the pool and gave conflicting answers when asked whether he had pulled her out. (3 RT 379-80.) He thought it odd that Petitioner seemed calm and never asked about Jackson's condition. (3 RT 387.) Cunningham described Petitioner's demeanor as atypical in that he appeared nonchalant, whereas people at the scene of a drowning are usually shocked or hysterical. (2 RT 33334.)

Los Angeles County Sheriff's deputies arrived at approximately 4:00 a.m., before Jackson was taken to

the hospital. (3 RT 397-98, 521-22.) Deputy Mark Ballin testified that Petitioner smelled of alcohol and appeared to be intoxicated. (3 RT 528.) Petitioner became belligerent and uncooperative when told that he could not leave the house, but he did not try to leave. (3 RT 528-29, 539.) Deputy Ballin stated that Petitioner did not display any concern about Jackson and never asked where the paramedics were taking her. (3 RT 534.) When Deputy Ballin asked Petitioner whether he saw what had happened, he said that he wanted to speak with his attorney. (3 RT 534.)

Deputy Kyle Burks described Petitioner as looking dazed. (4 RT 628.) When asked how the incident happened, Petitioner just kept on saying that Jackson drowned. (4 RT 629.) Deputy Burks considered Petitioner's conduct strange, because Petitioner became withdrawn or incoherent when he asked him questions but appeared to have no difficulty communicating during telephone calls with family members. (4 RT 638-39.) At about 4:20 a.m., Deputy Burks called the homicide unit. (4 RT 636-38.)

After receiving Petitioner's call, Sheila Bohana called her daughter's residence. (5 RT 550, 595-96.) Donna Bohana and her fiancé arrived at Petitioner's house shortly before the ambulance left. (4 RT 550-51, 631, 669.) Donna Bohana described Petitioner as distraught, in tears, and barely able to talk. (4 RT 555-54, 558.) Sheila Bohana, and her younger daughter, arrived at the house after Donna. (4 RT 556, 557, 596.) Petitioner's brother, a lawyer, subsequently arrived at about 5:30 a.m. and spoke with Petitioner. (4 RT 634, 640, 641-42.)

Homicide detective Sergeant David Watkins

arrived at the house at about 5:40 a.m. (4 RT 640, 663.) He looked around the pool and patio area to see if there were signs of a struggle, but did not see any. (4 RT 669.) At approximately 7:45 a.m., he interviewed Petitioner in the presence of his brother. (4 RT 671-72, 70.) Detective Snapper joined them while the interview was in progress. (4 RT 672.) Petitioner told Sergeant Watkins that Jackson arrived at his house at about 11:00 p.m. the preceding evening, bringing food. (4 RT 673.) They talked on the telephone to Sheila and Donna Bohana regarding Donna's upcoming wedding. (4 RT 674.) They listened to music, danced, and then undressed and went to the jacuzzi. (4 RT 674.) Before getting into the jacuzzi, Petitioner had wine, and Jackson had rum drinks, mixed with either Coke or orange juice. (4 RT 674, 681, 685.) In the jacuzzi, they drank wine, and Petitioner demonstrated how a glass half full of wine would float on water. (4 RT 682, 683.) The glass accidentally broke, and Petitioner went to get a bag and put the pieces in it. (4 RT 684.) Sergeant Watkins confirmed that he found a bag with pieces of a wine glass on the scene. (4 RT 684-85.)

Petitioner told Sergeant Watkins that he swam around the pool and got out. (4 RT 686.) When he was already out and sitting at the table, 8
Jackson swam to the deep end. (4 RT 686.) She touched the pool light, turned around and began swimming underwater towards the jacuzzi. (4 RT 686-87.) Petitioner was watching her and saw that she appeared to be having difficulty at the bottom of the pool. (4 RT 688.) He jumped into the pool to assist her, but she fought him off. (4 RT 688-89, 70506.) He left the pool, got a leaf net pole, and extended it to her. (4 RT 689-90, 708.) She did not

grab it. (4 RT 690.) He got another, longer, leaf net pole, but she did not grab that either.[2/] (4 RT 691-92, 708.) Petitioner then went inside and called 911. (4 RT 692.) He returned to the pool, jumped in, and by placing his hands under Jackson's armpits was able to lift her to the surface. (4 RT 693, 695; 8 RT 1437.)

Petitioner placed Jackson face down on the pool deck. (4 RT 695.) He pushed on her back to try to revive her, then turned her over and pushed on her stomach. (4 RT 696.) He sucked on her mouth to try to draw the water out. (4 RT 697.) The paramedics arrived while he was trying ro resuscitate her. (4 RT 697.) After the sheriff's deputies arrived, Petitioner called his brother and ex-wife. (4 RT 699.)

Petitioner told Sergeant Watkins that neither he nor Jackson was intoxicated. (4 RT 699.) Asked about Jackson's swimming ability, he said he thought she was a strong swimmer. (4 RT 699-700.) Sergeant Watkins described Petitioner as calm and rational during the interview. (4 RT 712-13.) Petitioner did not appear to have any injuries to his face or chest. (8 RT 1469.) Inquiries in the neighborhood disclosed that nobody had heard any shouting. (8 RT 1470.)

Later that day, Los Angeles County Coroner's Investigator Thomas Ratcliffe viewed Jackson's body in the coroner's office. (4 RT 778.) He noted that her right earlobe was torn, and there were scratches or lacerations on her chin and shoulder and by the corner of her eye. (4 RT 780, 781.) He observed

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2 A blue pool pole was found at the bottom of the deep end of the pool, entangled with the pool sweep hose. (4 RT 1426, 1466.)There was also a gold pool pole lying by the pool. (8 RT 1426.)

scratches and bruises on her breasts and legs, and bruises on her upper arm. (4 RT 782.) There was dirt under her right eyelid. (4 RT 786.)

On August 28, 1994, Petitioner called Sergeant Watkins and asked about the results of Jackson's autopsy. (4 RT 719.) Sergeant Watkins told him that the autopsy had not yet been performed. (4 RT 720.) Sergeant Watkins asked Petitioner about his swimming abilities, and Petitioner said he was an excellent swimmer. (4 RT 720.) He also noted that he knew CPR. (4 RT 720.) He told Sergeant Watkins that Jackson had swum in his pool on approximately six other occasions. (4 RT 721.) On this occasion, she was swimming with overhand strokes and executed an "Olympic style turnaround" against the wall at the deep end. (4 RT 722-23.)

On August 29, 1994, Dr. David Posey performed the autopsy, observed by Sergeant Watkins, Detective Snapper, and Drs. Lakshmanan, Vile, and Ansalamo. (4 RT 724, 728; 5 RT 815, 817.) In addition to the injuries noted by Investigator Ratcliffe, Dr. Posey found significant injuries to Jackson's head and neck. (5 RT 823-26, 852.) She had multiple lacerations to her lips and tongue and a triangular contusion to her right upper eyelid consistent with a "black eye." (5 RT 829, 848.) There were several small scratches on her face and chin, and she had blunt force traumatic injuries to both the left and right sides of her scalp. (5 RT 829-31, 844-50.) The injury on the left side was significant enough to have caused hemorrhaging, but did not fracture the skull. (5 RT 844-45.) Both her eyes had petechial hemorrhages, indicative of death by asphyxia. (5 RT 828.) Drowning is an asphyxial death. (5 RT 828.)

Jackson had a blood alcohol level of 0.22, representing approximately ten or eleven drinks. (5 RT 874, 876.) The condition of her liver indicated that she was a long term drinker. (5 RT 912.)

In Dr. Posey's opinion, Jackson died as a result of asphyxia due to drowning, and the circumstances pointed to assisted drowning, described by Dr. Posey as a "drowning where someone helps somebody drown."[3/] (5 RT 851-53, 880-82.) Dr. Posey opined that Jackson's blunt force trauma injuries, whether inflicted inside or outside the pool, were significant enough to have rendered her unconscious. (5 RT 878-79.) The injuries occurred prior to her death, while her heart was still beating. (5 RT 867-68, 873.) Except for "hickeys" and other older injuries on her breasts, Jackson's injuries were sustained less than four hours before her death. (5 RT 852, 855, 864.) Dr. Posey testified that Jackson's bruises and scalp wounds were not consistent with injuries that could have been inflicted by the pool poles. (5 RT 898-899, 901.) He testified that Jackson's injuries were not consistent with injuries that could have been inflicted by the paramedics in attempting to revive her, nor were they compatible with a seizure. (5 RT 889-90, 931-32.) Her injuries were consistent with injuries inflicted during an altercation. (5 RT 851.) Finally, Jackson did not have "washer woman's skin," or the

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3 Dr. Posey initially gave the cause of death as asphyxiation due to drowning associated with alcohol intake and blunt force injuries, and the manner of death as undetermined. (5 RT 877-78.) Two years later, on September 10, 1996, he amended the death certificate to state that the manner of death was homicide. (5 RT 878, 9520-53.)

wrinkling of the skin on the hands that occurs after 15 to 20 minutes in water, especially warm water. (5 RT 910-11.)

In the days following Jackson's death, her friends and relatives contacted him to ask about the drowning. On August 28, 1994, Petitioner returned a call from Jackson's friend Peggy Rowe. (6 RT 1135-36.) Rowe asked him to tell her what had happened and took notes. (6 RT 1137-38.) When Petitioner described how Jackson swam a breast stroke to the deep end of the pool, Rowe objected that Jackson did not swim. (6 RT 1141.) Petitioner contradicted her, telling her that Jackson was a strong swimmer. (6 RT 1141.) Petitioner said that Jackson looked like she was having a seizure, and he went underwater to help her. (6 RT 1141.) She struggled with him, so he went back up for air, then dove down and pulled her out of the pool. (6 RT 1141.) When Rowe said she had heard he went to the house first, Petitioner said he never got out of the pool until he pulled Jackson out. (6 RT 1142.) He tried to give her CPR, then called 911, and tried again to breathe for her. (6 RT 1142.) Petitioner never mentioned trying to fish Jackson out with leaf net poles. (6 RT 1143.) Petitioner asked Rowe whether Jackson had high blood pressure or seizures, and whether she took any medication. Rowe told him that she did not. (6 RT 1142, 1143.)

On August 29, 1994, Petitioner described Jackson's drowning to her aunt, Lydia Yeppes. (6 RT 1180, 1183.) He said that he pulled Jackson out of the pool, but did not mention trying to get her out with a leaf net pole. (6 RT 1185.) He told Yeppes that he had taken off Jackson's "bodysuit" to give her air. (6 RT 1188.)

Amelia Patterson, personal assistant to Jackson's former mother-inlaw Katherine Jackson, obtained Petitioner's telephone number from Rowe and called him to find out what had happened. (6 RT 1194, 1197.) Petitioner described the drowning, and Patterson told him that she found his description hard to believe because Jackson did not swim. (6 RT 1201.) Petitioner said that Jackson was an avid swimmer and must have hit her head while doing an Olympic turn. (6 RT 1201.) He asked Patterson whether Jackson had seizures and whether she could have had a seizure from taking Tylenol PM. (6 RT 1201-02.) He told Patterson that Jackson had taken Tylenol PM the night she drowned.[4] (6 RT 1202.)

On August 29, 1994, Jackson's friend Brenda Richie called Petitioner to ask how Jackson had died. (6 RT 1160, 1176.) When Petitioner said that Jackson was doing "parallel strokes, back strokes, Olympic style turns," she interrupted him to say that Jackson could not swim. (6 RT 1161.) Petitioner insisted that Jackson could swim and was an avid swimmer. (6 RT 1161.) Petitioner told Richie that he jumped in to rescue Jackson, but she fought him so he left the pool to call 911. (6 RT 1161-63.) He then returned to the pool and pulled her out. (6 RT 1163.) Petitioner asked Richie whether Jackson had seizures. (6 RT 1175.) After Jackson's wake, Richie called Petitioner again, because she had noticed bruises on Jackson's body and wanted to ask about them. (6 RT 1174.) Petitioner told her he had used a pool skimmer to try to get Jackson out, and it must have bruised her. (6

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4 The drug screen did not detect any Tylenol in Jackson's system. (5 RT 928-29.)

RT 1174.)

Jackson's funeral was on September 2, 1994. (7 RT 1254.) Petitioner was asked not to attend. (7 RT 1305.) After the funeral, Jackson's friend Loretta Gilmore, an oral surgeon, drove by Petitioner's house, and he invited her in. (7 RT 1241, 1254.) Petitioner told Dr. Gilmore he went into the house to get something, and when he returned, Jackson was struggling near the bottom of the pool. (7 RT 1255.) He went into the pool to rescue her, but she would not cooperate. (7 RT 1256.) Dr. Gilmore asked about the injuries on Jackson's body, and Petitioner said they were caused by his efforts to get her out of the pool with the pool pole. (7 RT 1256-57.)

A number of Jackson's friends and relatives testified that Jackson was afraid of swimming pools and could not swim. Rowe testified that Jackson was afraid to go near a pool and had never done so in her presence. (6 RT 1147.) Patterson testified that Jackson was "very afraid of the water," would not get in a pool other than a jacuzzi, and told Patterson, at a July 16, 1994 birthday party for Jackson's son held at Katherine Jackson's residence, not to leave Jackson alone to supervise the children in the pool because she could not swim. (6 RT 1194-95, 1201.) Richie, who had known Jackson for 20 years, testified that Richie had never known Jackson to go near the water. (6 RT 1157.)

However, she and Jackson were planning to take swimming lessons together, because Jackson was about to turn 40 and thought it was time to learn to swim. (6 RT 1157-58.)

Dr. Gilmore testified that Jackson was even afraid of going into a jacuzzi. (7 RT 1268.) Jackson's former mother-in-law, Katherine Jackson, testified that she

had never seen Jackson in either a swimming pool or a jacuzzi. (7 RT 1226, 1227.) Jackson's ex-husband, Tito Jackson, testified that he never saw Jackson swim, but he had seen her in a jacuzzi. (7 RT 1231, 1232, 1237.) Her son Taj testified that Jackson could not swim, he saw her in a jacuzzi "maybe once," and he never saw her in a swimming pool. (7 RT 1367.) However, during a visit to New York around August 15, 1994, she told him that Petitioner was going to teach her to swim, and she had already been on the steps of the swimming pool. (7 RT 1367-69.) Her son Tarryl testified that it was "a big deal" for her to even get into a jacuzzi, but he may have once seen her in the shallow end of a pool by the steps. (7 RT 1389, 1394, 1396.)

Jackson's friend and hairdresser Amy Winer testified that Jackson was terrified of the water. (7 RT 1286.) In June 1994, Winer had difficulty persuading Jackson to get on a raft in the shallow part of a hotel pool, even though Winer held her the entire time. (7 RT 128688.) Winer also testified that, as Jackson's hairdresser who did her hair about once a week, she would have noticed a change in Jackson's hair color if her hair had been exposed to chlorine, and there was no such change. (7 RT 1302-04.) However, Winer admitted on cross-examination that, after Jackson met Petitioner, Jackson started talking about going into swimming pools. (7 RT 1310.) Jackson told Winer that she was going into the jacuzzi with Petitioner. (7 RT 1307.) Jackson also told Winer that she trusted Petitioner and would go into the pool with him. (7 RT 1307.) Winer noticed bruises on Jackson's arms, which Jackson said were from Petitioner holding her up in the pool; however, Jackson said that, even when he held her, she would

not go beyond the steps. (7 RT 1317-18, 1332.) Jackson did not say that Petitioner was teaching her to swim. (7 RT 1333.)

William Richardson, a retired marine safety captain with extensive experience in lifeguarding, testified that generally a person rescued from a swimming pool in an unconscious state would have bruised wrists and scrapes on the buttocks and hips. (6 RT 1068, 1072-73.) The rescuer would have scratches. (6 RT 1074.) He has never encountered a situation where a drowning person pushed the rescuer away. (6 RT 1074, 1077-78.) After reviewing the police reports, photographs and diagrams of Petitioner's pool, Petitioner's statements, and statements of other witnesses, Richardson's opinion was that Jackson was not recovered from the pool in the manner described by Petitioner. (6 RT 1092-94.) He based that conclusion on the lack of expected injuries to Jackson's body, her position against a tree rather than by the pool, and Petitioner's statement that he attempted to administer CPR while Jackson was face down. (6 RT 1093-94.)

Sheila Bohana testified that she had never known Petitioner to be violent, even when intoxicated, and he never hit her or threatened her with harm. (4 RT 582-83, 609.) Nevertheless, their 1977 divorce was unpleasant. (4 RT 587.) Petitioner wanted to reconcile, and she did not; she obtained a restraining order against him to keep him from harassing her. (6 RT 591, 605.) To obtain the restraining order, she represented that he had threatened to kill her, but this was not true. (6 RT 590-91, 609.) Some years after the divorce, they became good friends. (6 RT 606.)

II. DEFENSE EVIDENCE

Petitioner testified. (9 RT 1580.) Petitioner has an MBA from Pepperdine and for many years worked in management positions in the health care field, later operating an insurance company and a bank. (9 RT 1582-85, 1588-92.) He then had a management position at Denny's Restaurant chain. (9 RT 1595-96.) He served on the Los Angeles Airport Commission and the Los Angeles County Adoption Commission. (9 RT 159899.)

Petitioner had CPR training while he was employed in the health care field, because it is required for all persons working at hospitals. (9 RT 1586-88.) His last CPR class was in 1974. (9 RT 1588.)

Petitioner testified that Jackson never mentioned or demonstrated any fear of the water. (9 RT 1616, 1620, 1622.) She first swam in his pool probably the second weekend he knew her; he started swimming, and she jumped in and joined him. (9 RT 1616-17.) She swam well, and it never occurred to him that she was a non-swimmer. (9 RT 1617, 1620.) He did not give her swimming lessons. (9 RT 1617-18.) She usually had some alcohol before she swam, because she was a heavy drinker. (9 RT 1620.)

Jackson had a seizure on one occasion in Petitioner's house. (9 RT 1635.) Afterwards she told him that she was taking Tylenol PM, and he thought that maybe it was a reaction to the combination of the medication and rum. (9 RT 1635-36.) It was this incident that caused him to ask Jackson's friends, after her death, whether she suffered from seizures. (9 RT 1636.)

Jackson was helping Petitioner with a bridal

shower for his daughter, Donna Bohana; Jackson also was helping Donna to plan flowers and music for her wedding. (9 RT 1625.) Jackson was to be the hostess for Donna's shower. (9 RT 1633.) Jackson also talked to Sheila Bohana, Donna's mother, about the wedding. (9 RT 1625.) Petitioner and his ex-wife Sheila are best friends. (9 RT 1625-26.)

Petitioner did not want Jackson to come over on Friday, August 26, 1994, because he had too much to do the next day in preparation for his daughter's shower on Sunday. (9 RT 1629.) However, when she called around 10:15 p.m. or 10:30 p.m. and said that she would come by and bring something to eat, he agreed. (9 RT 1631.) Petitioner had food and wine, and Jackson drank rum and coke. (9 RT 1632.) Petitioner then called Sheila Bohana regarding the shower or the wedding, and Jackson also talked with her while he turned on the jacuzzi. (9 RT 1634.)

They danced in the living room, then Petitioner removed his clothes and went to the jacuzzi. (9 RT 1637.) Jackson put on her swimsuit, got into the jacuzzi, and took it off. (9 RT 1637.) They sat in the jacuzzi for 20 to 40 minutes while Petitioner drank wine. (9 RT 1640.) Petitioner then swam to the seat on the other side of the pool and she did the same. (9 RT 1640-41.) They sat there for a while, then returned to the jacuzzi. (9 RT 1641.) Petitioner used his wine glass to demonstrate how wine is lighter than water, but the glass broke. (9 RT 1642.) He got out and put the pieces in a bag. (9 RT 1642.)

Eventually, Petitioner left the jacuzzi, swam to the pool light on the other side of the pool and back, got out of the pool, and sat down at a patio table. (9 RT 1644-45.) Petitioner saw Jackson swim from the shallow end of the pool to the pool light at the deep

end. (9 RT 164546.) She turned around and kicked off, a movement that Petitioner had described to the sheriffs as an "Olympic turn." (9 RT 1646.) Her arms moved, but she seemed to be struggling and sank. (9 RT 1647.)

Petitioner dived in and tried to grab Jackson's arm, but he missed and had to come back up for air. (9 RT 1647.) He dived back in, but he was unable to get a grip on her. (9 RT 1648-49.) He got out of the pool, ran to the side of the house, and grabbed the first pool pole he saw. (9 RT 1649.) He tried to scoop her up with it but it was too short, so he threw it in the pool and ran to get the newer pool pole, which had an extension. (9 RT 1649-50.) He was able to get the long pole under Jackson a few times, but she always fell off. (9 RT 1655-56.) Finally, he was able to get the pole under her and moved her to the side of the pool. (9 RT 1655.) He put his elbow on the coping, slid into the water, grabbed Jackson, and got her out of the pool. (9 RT 1658-59.)

Petitioner started pushing on Jackson's back to get water out. (9 RT 1660.) He turned her over and began breathing into her mouth. (9 RT 1660.) Jackson made a sound and "white stuff" came out of her mouth. (9 RT 1661.) He picked her up and moved her to the tree to have more light. (9 RT 1661-62.) He then ran inside and called 911. (9 RT 1662.)

After the paramedics came, Petitioner constantly asked whether Jackson would be all right. (9 RT 1665.) One of the paramedics said she had a pulse, so he thought they would be able to revive her. (9 RT 1665.) He did not go inside to dress until after the paramedics had taken Jackson away on the gurney. (9 RT 1668.) At some point, Petitioner called his ex-wife and his brother. (9 RT 1669.)

Petitioner felt offended by the deputies' behavior, because they were ordering him around and he had not done anything. (9 RT 1670.) He answered all the detectives' questions and did his best to tell them what had happened. (9 RT 1679-80.) When he said Jackson was struggling, he meant that it was a struggle to get her out, not that she was pushing him away. (9 RT 1680.)

The following morning, Petitioner noticed scrapes on his elbows and legs. (9 RT 1670.) On August 31, 1994, he went to Kaiser Permanente to get medical attention for them, because he thought they might contain gummite from the pool. (9 RT 1671; 10 RT 1793.) The doctor cleaned them out and put salve on them. (10 RT 1793.)

Petitioner was not jealous of Jackson, or "madly in love" with her, and had no reason to be angry at her. (9 RT 1681-82.) He never asked her for money and knew she did not have any. (9 RT 1682.) He had no desire either to "hobnob" with the Jackson family or to obtain money from them. (9 RT 1683.) He never hit her and had no motive to kill her. (9 RT 1683.)

Jackson's former brother-in-law Randy Jackson testified that he heard on the news that Jackson was learning to swim and thought it strange, because the family had always discouraged her from being around the water. (9 RT 1577, 1578.) At the funeral, a reporter asked him whether Jackson could swim, and he said that "she was discouraged to swim."[5/] (9 RT

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5 Defense counsel apparently heard the statement as being "Yes, she's learning to swim." (9 RT 1579.) The videotape of the statement was played for the jury. (9 RT 1579.)

1579.)

PETITIONER'S CONTENTIONS

1. The evidence was insufficient to support Petitioner's conviction for second degree murder.

2. Defense counsel was ineffective, because he failed to present available exculpatory evidence from a forensic pathologist and an aquatics expert.

3. Defense counsel was ineffective, because he failed to request an instruction regarding the lesser included offense of involuntary manslaughter.

4. Defense counsel was ineffective, because he failed to object to: (a) evidence that Petitioner consulted with counsel; (b) irrelevant and improper opinions and characterizations by the witnesses and the prosecutor; and (c) factual misstatements by the prosecutor.

5. Defense counsel was ineffective, because he failed to adequately inform and advise Petitioner about alternative defenses to a murder charge.
(Petition at 5-6, Attachment.)

STANDARD OF REVIEW

The Petition is governed by 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Under Section 2254(d), a federal court may not grant a writ of habeas corpus on behalf of a person in state custody "with respect to any claim that was adjudicated on the merits in state court proceedings unless the

adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d); see also *Brown v. Payton*, 544 U.S. 133, 141, 125 S. Ct. 1432, 1438 (2005). In this case, review of Petitioner's claims is governed by Section 2254(d)(1).[6]

"Clearly established Federal law," for purposes of Section 2254(d)(1) review, "refers to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412, 120 S. Ct. 1495, 1523 (2000); see also *Carey v. Musladin*, ___ U.S. ___, 127 S. Ct. 649, 653 (2006); *Lockyer v. Andrade*, 538 U.S. 63, 71-72, 123 S. Ct. 1166, 1172 (2003)(clearly established federal law is "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision"). Section 2254(d)(1) "plainly restricts the source of clearly established law to the Supreme Court's jurisprudence." *Lambert*, 393 F.3d at 974; see

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6 See *Lambert v. Blodgett*, 393 F.3d 943, 966-69 (9th Cir.2004)(Section 2254(d) applies when the state court has denied a claimbased on its substance, rather than on the basis of a procedural or other rule precluding state court review of the merits). Petitioner has not raised any Section 2254(d)(2) challenge to the state court's rejection of his claims, and the record does not reveal any basis for such a challenge.

also *Hernandez v. Small*, 282 F.3d 1132, 1140 (9th Cir. 2002)(only the Supreme Court's decisions "can form the basis justifying habeas relief"). Although "[o]nly Supreme Court precedents are binding on state courts under AEDPA," Ninth Circuit "precedents may be pertinent to the extent that they illuminate the meaning and application of Supreme Court precedents." *Campbell v. Rice*, 408 F.3d 1166, 1170 (9th Cir. 2005)(en banc).

Under the first prong of Section 2254(d)(1), a state court decision is "contrary to" federal law if the state court applies a rule that contradicts the governing law as stated by the Supreme Court or reaches a different conclusion than that reached by the high court on materially indistinguishable facts. *Price v. Vincent*, 538 U.S. 634, 640, 123 S. Ct. 1848, 1853 (2003). This includes "mistakes in reasoning" or "use of the wrong legal rule or framework." *Frantz v. Hazey*, ___ F.3d ___, 2008 WL 170323, *5 (9th Cir. Jan. 22, 2008)(en banc). The second prong of Section 2254(d)(1) is met when a state court identifies the correct governing legal principle from the Supreme Court's decisions, but unreasonably applies it to the facts of the petitioner's case. *Williams*, 529 U.S. at 412-13, 120 S. Ct. at 1523.

The "unreasonable application" inquiry is an objective one, and the standard is not satisfied simply by showing error or incorrect application of the governing federal law. *Andrade*, 538 U.S. at 75, 123 S. Ct. at 1174; *Woodford v. Visciotti*, 537 U.S. 19, 25, 123 S. Ct. 357, 360 (2002)(per curiam); *Williams*, 529 U.S. at 409, 120 S. Ct. at 1521. "[E]ven if the federal habeas court concludes that the state court decision applied clearly established federal law incorrectly, relief is appropriate only if that application is also

objectively unreasonable." *Penry v. Johnson*, 532 U.S. 782, 793, 121 S. Ct. 1910, 1918 (2001). "The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable - a substantially higher threshold." *Schriro v. Landrigan*, ___ U.S. ___, 127 S. Ct. 1933, 1939 (2007).

Further, the Supreme Court has explained that the "range of reasonable judgment" to be assessed under the "unreasonable application" prong is dependent on the nature of the clearly-established law in question, to wit, whether the rule the high court has stated is general or specific. As to specific legal principles, the "range of reasonable judgment" "may be narrow." As to general standards, "[t]he more general the rule, the more leeway courts have in reaching outcomes in case by case determinations." *Yarborough v. Alvarado*, 541 U.S. 652, 664, 124 S. Ct. 2140, 2149 (2004).

DISCUSSION

I. PETITIONER'S SUFFICIENCY OF THE EVIDENCE CLAIM DOES NOT WARRANT FEDERAL HABEAS RELIEF.

By Ground One, Petitioner contends that the evidence at trial was insufficient to support his conviction for second degree murder, because the state failed to prove beyond a reasonable doubt the existence of malice, and that the death was an unlawful killing rather than an excusable homicide by accident or misfortune. (Petition at 5, Attachment.)

1. The Clearly Established Federal Law

The Fourteenth Amendment's Due Process Clause guarantees that a criminal defendant may be convicted only "upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re *Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1072 (1970). Prior to the AEDPA, the Supreme Court announced the federal standard for determining the sufficiency of the evidence to support a conviction in *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781 (1979). Under *Jackson*, "[a] petitioner for a federal writ of habeas corpus faces a heavy burden when challenging the sufficiency of the evidence used to obtain a state conviction on federal due process grounds." *Juan H. v. Allen*, 408 F.3d 1262, 1274 (9th Cir. 2005). "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789 (emphasis in original); see also *Wright v. West*, 505 U.S. 277, 284, 112 S. Ct. 2482, 2485-86 (1992). "Put another way, the dispositive question under Jackson is 'whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.'" *Chein v. Shumsky*, 373 F.3d 978, 982-83 (9th Cir. 2004)(en banc)(quoting Jackson).

When the factual record supports conflicting inferences, the federal court must presume -- even if it does not affirmatively appear on the record -- that the trier of fact resolved any such conflicts in favor of the prosecution, and the court must defer to that resolution. See *Jackson*, 443 U.S. at 326, 99 S. Ct. at

2793. "Jackson cautions reviewing courts to consider the evidence 'in the light most favorable to the prosecution.'" *Bruce v. Terhune*, 376 F.3d 950, 957 (9th Cir. 2004)(quoting Jackson). Additionally, '"[c]ircumstantial evidence and inferences drawn from it may be sufficient to sustain a conviction."' *Walters v. Maass*, 45 F.3d 1355, 1358 (9th Cir. 1995)(citation omitted).

Moreover, "[a] jury's credibility determinations are ... entitled to near-total deference under Jackson." *Bruce*, 376 F.3d at 957; see also *Schlup v. Delo*, 513 U.S. 298, 330, 115 S. Ct. 851, 868 (1995)("under *Jackson*, the assessment of the credibility of witnesses is generally beyond the scope of review"). The reviewing court "must respect the province of the jury to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts by assuming that the jury resolved all conflicts in a manner that supports the verdict." *Walters*, 45 F.3d at 1358.

The federal court must refer to the substantive elements of the criminal offense as defined by state law and look to state law to determine what evidence is necessary to convict on the crime charged. See *Jackson*, 443 U.S. at 324 n.16, 99 S. Ct. at 2792 n.16; *Juan H.*, 408 F.3d at 1275. Further, this Court must defer to the state court's interpretation of state law. See *Wainwright v. Goode*, 464 U.S. 78, 84, 104 S. Ct. 378, 382 (1983)("the views of the state's highest court with respect to state law are binding on the federal courts"); see also *Missouri v. Hunter*, 459 U.S. 359, 368, 103 S. Ct. 673, 679 (1983)(federal courts are bound to accept the state court's construction of that state's statutes).

The *Jackson* standard applies to federal habeas

claims attacking the sufficiency of the evidence to support a state conviction. See *Juan H.*, 408 F.3d at 1274; Chein, 373 F.3d at 983; see also *Bruce*, 376 F.3d at 957. The AEDPA, however, requires the federal court to "apply the standards of *Jackson* with an additional layer of deference." *Juan H.*, 408 F.3d at 1274. The federal habeas court must determine whether the state decision rejecting a sufficiency of the evidence challenge was an unreasonable application of *Jackson*. *Sarausad v. Porter*, 479 F.3d 671, 677 (9th Cir. 2007)), pet. for cert. filed, 76 U.S.L.W. 3324 (Dec. 7, 2007)(No. 07-772); *Juan H.*, 408 F.3d at 1275 & n.13. Review of a *Jackson* sufficiency of the evidence claim "in all cases" must proceed under Section 2254(d)(1), rather than under Section 2254(d)(2). *Sarausad*, 479 F.3d at 678.

B. The Evidence Was Sufficient To Support Second Degree Murder.

Under California law, second degree murder is the unlawful killing of a human being with malice aforethought, but without the additional elements (i.e., willfulness, premeditation, and deliberation) that would support a conviction for first degree murder. *People v. Hansen*, 9 Cal. 4th 300, 307, 36 Cal. Rptr. 2d 609, 612 (1994); California Penal Code §§ 187 and 189. Express malice exists "when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature." California Penal Code § 188. Implied malice exists "when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." Id.

A second degree murder based on implied malice

is committed when a person "does an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life." *People v. Watson*, 30 Cal. 3d 290, 300, 179 Cal. Rptr. 43, 49 (1981)(citations and internal quotation marks omitted). "Phrased in a different way, malice may be implied when defendant does an act with a high probability that it will result in death and does it with a base antisocial motive and with a wanton disregard for human life." Id. However, it is not necessary to establish that the defendant intended that his act would result in the death of a human being. *People v. Swain*, 12 Cal. 4th 593, 603, 49 Cal. Rptr. 2d 390, 394 (1996). Implied malice may be proved by circumstantial evidence. *People v. James*, 62 Cal. App. 4th 244, 277, 74 Cal. Rptr. 2d 7, 28 (1998); see also *People v. Lines*, 13 Cal. 3d 500, 505, 119 Cal. Rptr.225, 228 (1975)(malice "may be inferred from the circumstances of the homicide.").

Applying these standards, the California Court of Appeal concluded that "[t]he record contains sufficient evidence that [Petitioner] acted with implied malice by forcing Jackson, a non-swimmer, into the deep end of his swimming pool either before or after beating her." (Return, Ex. D at 6.) The Court of Appeal pointed to evidence that: (1) Jackson could not swim and was afraid of swimming pools; (2) had many blunt force trauma injuries, most of which were inflicted within four hours before her death and, in the opinion of three expert witnesses, were not the result of the rescue efforts described by Petitioner; and (3) at the time of her death, had a blood alcohol level of 0.22 and had been in the water for less than

20 minutes. (Return, Ex. D at 8.) The state court observed that the blows to Jackson's head "likely rendered her unconscious." (*Id.*) The state appellate court then concluded:

> A rational trier of fact could and did draw the logical and reasonable inference from this evidence that Jackson did not voluntarily enter the deep end of the pool but was instead forced into the water by [Petitioner], either before or after he beat her to unconsciousness. [citation omitted] Because she was unconscious, intoxicated and unable to swim, Jackson could not rescue herself. The wounds on Jackson's body and the expert testimony provide an evidentiary basis for the jury to conclude that [Petitioner] intentionally beat Jackson, rather than accidentally inflicting injuries while attempting to rescue or resuscitate her. A rational jury could find that [Petitioner] acted with implied malice when he forced an injured, unconscious non-swimmer to remain in the deep end of his swimming pool until she drowned.

(Return, Ex. D at 8.)

The California Court of Appeal did not unreasonably apply Jackson in concluding that the record contains sufficient evidence to support a conviction for second degree murder. Jackson's sons, ex-husband, ex-mother-in-law, and several friends testified that she could not swim and was afraid of the water. (6 RT 1147, 1157, 1194, 1201, 1206, 1268; 7 RT 1227, 1231-32, 1237, 1367-69, 1394, 1396.) Jackson had numerous blunt force trauma injuries, most of which were concentrated on her head or neck. They included contusions on her arms, a triangular

contusion on her right eye (a so-called "black eye"), a lacerated earlobe, a bruise on her arm, and blunt force injuries to her head that caused a hemorrhage through the muscle and down to the skull. (5 RT 823-26, 826, 829-31, 833-34, 839, 844-50, 852, 878, 888-89.) The injuries to her head were sufficient to render her unconscious. (5 RT 878-79.) According to the coroner, these injuries were inflicted not more than four hours before her death, and her skin did not show signs of having been in the water for more than twenty minutes. (5 RT 852, 855, 91011.) In the coroner's view, Jackson's bruises and scalp injuries were not consistent with injuries that could have been inflicted by the leaf net poles, nor were her injuries consistent with having been inflicted by the paramedics attempting to revive her. (5 RT 910-11, 931-32.)

Moreover, there was circumstantial evidence -- Jackson's position by a tree some distance from the pool, her dry skin, her damp rather than wet hair -- suggesting that Petitioner may not have called 911 immediately after taking her from the pool. (2 RT 318; 3 RT 374, 381, 384, 485; 7 RT 1274-75.) The paramedics and officers on the scene testified that Petitioner was uncooperative and appeared unconcerned about whether Jackson lived or died. (3 RT 333-34, 387, 500, 534.) This evidence, taken together, was sufficient to enable a rational jury to find that Petitioner beat Jackson and forced her into the deep end of the pool, knowing that she could not swim and would drown.

Petitioner argues that this is a "speculative scenario" that cannot be the basis for a finding of guilt beyond a reasonable doubt. According to Petitioner, all the factual scenarios argued by the

prosecutor in her closing statement depended on inferences that were "irrational, unreasonable, and speculative."[7] (Traverse at 96.) It is true that "mere suspicion or speculation cannot be the basis for creation of logical inferences." *Walters*, 45 F.3d at 1358. The above-described scenario, however, rests on logical inferences that could be drawn from the circumstantial evidence presented and not on mere speculation.

Petitioner correctly points out that the record also contains evidence supporting his version of the events, according to which Jackson voluntarily swam to the deep end, sank to the bottom, and drowned, sustaining injuries in the course of his attempts to rescue her. There was testimony from Jackson's friend and son that she had expressed a desire to learn to swim and had said she would go into a pool with Petitioner, at least while he held her. (6 RT 1157-58; 7 RT 1306, 1310, 1330, 1367-69.) Jackson had an alcohol blood level of 0.22, which the jury could have found made her more likely to go into the pool. (5 RT 874.) There was no evidence that

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7 At closing argument, the prosecutor argued that the jury could find Petitioner guilty of murder under a variety of factual scenarios. She argued that the jury could find Petitioner guilty of second degree murder if it found that Petitioner, knowing that Jackson could not swim, beat her and she fell in the water, or he pushed herein to the water. (11 RT 1925, 1927, 1933-34.) The prosecutor argued that if the jury found that Petitioner also prevented Jackson from getting out of the pool or held her underwater until she drowned, it should find him guilty of first degree murder. (11 RT 1925, 1934.)

Petitioner had previously abused Jackson physically; on the contrary, Dr. Posey opined that the absence of injuries of varying ages on Jackson's body suggested that she was not in an abusive relationship.[8] (5 RT 933-34.) Nobody in the neighborhood heard any shouting. (8 RT 1470.) There was no evidence that Petitioner had a motive to kill Jackson.

However, it is not this Court's province to re-weigh the evidence. The Court, "faced with a record of historical facts that supports conflicting inferences must presume -- even if it does not affirmatively appear in the record -- that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Jackson*, 443 U.S. at 326, 99 S. Ct. at 2792. "The relevant inquiry is not whether the evidence excludes every hypothesis except guilt, but whether the jury could reasonably arrive at its verdict." *United States v. Mares*, 940 F.2d 455, 458 (9th Cir. 1991).

Under the governing standard of review, the Court need not find that the conclusion of guilt was compelled, only that it rationally could have been reached. *Drayden v. White*, 232 F.3d 704, 709-10 (9th Cir. 2000). As California the Court of Appeal stated: "These circumstances could have led the jury to a different result but they do not, as a matter of law, undermine the substantial evidentiary support for

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8 There was evidence that Jackson had bruises on her arms, which she explained to Winer as having been caused by Petitioner holding her up in the pool. (7 RT 1307, 1330.) Rowe also noticed bruises on Jackson's upper arms. (6 Rt 1145.) In addition, Jackson'sson Tarryl noticed a bruise on her arm. (7 Rt 1387-88.)

the verdict." (Return, Ex. D at 9.)

Applying these standards, the state court found that there was substantial evidence supporting the jury's finding that Petitioner was guilty of second degree murder. (Return, Ex. D at 9.) The state court's conclusion cannot be characterized as an unreasonable application of Jackson. See *Juan H.*, 408 F.3d at 1274-75. Accordingly, Petitioner's sufficiency of the evidence claim does not warrant federal habeas relief.

II. PETITIONER'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS DO NOT WARRANT FEDERAL HABEAS RELIEF.

By Grounds Two through Five, Petitioner contends that he is entitled to habeas relief, because he did not receive the effective assistance of counsel to which he was entitled under the Sixth Amendment. (Petition at 5-6, Attachment.) Petitioner contends that defense counsel failed to: (1) present exculpatory expert evidence (Ground Two); (2) request an instruction on involuntary manslaughter (Ground Three); (3) object to: (a) evidence that Petitioner consulted counsel; (b) improper opinions and characterizations expressed by various witnesses; and (c) factual misstatements made by the prosecutor during closing argument (Ground Four); and (4) advise Petitioner regarding alternative defenses to murder (Ground Five). (Id.) For the reasons set forth below, Petitioner's ineffective assistance claims do not warrant federal habeas relief.

A. The Clearly Established Federal Law

The Sixth Amendment to the United States Constitution guarantees the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984). When a petitioner claims a Sixth Amendment violation based on his counsel's performance, "[i]n addition to the deference granted to the state court's decision under AEDPA, [federal habeas courts] review ineffective assistance of counsel claims in the deferential light of" *Strickland*. *Brown v. Ornoski*, 503 F.3d 1006, 1011 (9th Cir. 2007).

To prevail on a claim that his counsel rendered ineffective assistance, Petitioner must demonstrate that: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced his defense. *Strickland*, 466 U.S. at 688-93, 104 S. Ct. at 2064-68; see also *Yarborough v. Gentry*, 540 U.S. 1, 5, 124 S. Ct. 1, 4 (2003)(per curiam)(the Sixth Amendment right "is denied when a defense attorney's performance falls below an objective standard of reasonableness and thereby prejudices the defense"). As both prongs of the *Strickland* test must be satisfied in order to establish a constitutional violation, failure to satisfy either prong requires that a petitioner's ineffective assistance claim be denied. *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069 (no need to address deficiency of performance if lack of prejudice is obvious); *Williams v. Calderon*, 52 F.3d 1465, 1470 (9th Cir. 1995)(same); *Siripongs v. Calderon*, 133 F.3d 732, 737 (9th Cir. 1998)(no need to address prejudice when petitioner cannot establish deficient performance).

The first prong of the Strickland test -- deficient

performance -requires a showing that counsel's performance was "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690, 104 S. Ct. at 2066. The relevant inquiry under *Strickland* is not what defense counsel could have done, but whether counsel's choices were reasonable. See *Babbitt v. Calderon*, 151 F.3d 1170, 1173 (9th Cir. 1998). Judicial scrutiny of counsel's performance "must be highly deferential," and this Court must guard against the distorting effects of hindsight and evaluate the challenged conduct from counsel's perspective at the time in issue. *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065; see also *Gentry*, 540 U.S. at 8, 124 S. Ct. at 6 ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."); *Wiggins v. Smith*, 539 U.S. 510, 523, 123 S. Ct. 2527, 2536 (2003)(the first *Strickland* prong is a "contextdependent consideration of the challenged conduct as seen 'from counsel's perspective at the time'"). A habeas reviewing court can neither second-guess counsel's decisions nor "'apply the fabled twenty-twenty vision of hindsight'" but, "rather, will defer to counsel's sound strategy." *Murtishaw v. Woodford*, 255 F.3d 926, 939 (9th Cir. 2001). "The defendant bears the heavy burden of proving that counsel's assistance was neither reasonable nor the result of sound trial strategy." Id. See also *Edwards v. Lamarque*, 475 F.3d 1121, 1126 (9th Cir. 2007)(en banc)("Because this case involves a claim of ineffective
assistance of counsel, there is an additional layer of deference to the choices of trial counsel."), cert. denied, 128 S. Ct. 532 (2007).

Due to the difficulties inherent in making the

above-described evaluation, there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland,* 466 U.S. at 689, 104 S. Ct. at 2065. Petitioner must "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065 (internal quotation marks and citation omitted); see also *Bell v. Cone*, 535 U.S. 685, 698, 122 S. Ct. 1843, 1852 (2002)(even if an ineffective assistance claim is not subject to Section 2254(d)(1) deference, the petitioner still must overcome the presumption that counsel's conduct might be considered sound trial strategy).

The second prong of the *Strickland* test -- prejudice -- requires a showing of a "reasonable probability that, but for counsel's unprofessional errors, the result of the [trial] would have been different." *Strickland,* 466 U.S. at 694, 104 S. Ct. at 2068. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." Id.; see also *Visciotti,* 537 U.S. at 22, 123 S. Ct. at 359.

Finally, for a petitioner to succeed on an ineffective assistance of counsel claim in a Section 2254 proceeding, it is not enough to persuade a federal court that the *Strickland* test would be satisfied if his claim "were being analyzed in the first instance." *Bell,* 535 U.S.at 698-99, 122 S. Ct. at 1852. It also "is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied *Strickland* incorrectly." Id. Rather, the petitioner must show that the state courts" applied Strickland to the facts of his case in an objectively unreasonable manner." *Id.*; see also

Gentry, 540 U.S. at 5, 124 S. Ct. at 4; *Visciotti*, 537 U.S. at 24-25, 123 S. Ct. at 360.

B. Failure To Present Expert Evidence (Ground Two)

Petitioner contends that defense counsel was ineffective, because he failed to call as expert witnesses a forensic pathologist and an aquatics expert, with whom he had previously consulted and who were available to give helpful testimony. (Petition at 5, Attachment; Traverse at 41-58.)

As discussed above, an evidentiary hearing regarding this claim was held in the Los Angeles Superior Court. (Return, Ex. M; 1 EHT 5.) Defense counsel and the two expert witnesses, forensic pathologist Dr. Michael Baden and aquatics expert Dr. Glen Egstrom, testified at the hearing. In addition, Petitioner presented testimony by forensic pathologist Dr. Paul Herrmann and Petitioner's brother Lawrence Bohana, and the state presented testimony by Deputy Medical Examiner Dr. Christopher Rogers and aquatics expert Alvin Smith. (1 EHT 8, 81, 148; 2 EHT 409, 460, 347, 383.) The Superior Court also had before it declarations by defense counsel, Petitioner, Petitioner's brother, Dr. Baden, Dr. Egstrom, Dr. Herrmann, and the coroner who testified at trial, Dr. Posey. (Return, Exs. G and N; Traverse, Ex. B.)

1. Failure To Call Dr. Michael Baden

According to his declaration and testimony at the evidentiary hearing, Harland Braun ("Braun" or "defense counsel") has been an attorney since 1968,

and he was certified as a criminal defense specialist in 1973. (Return, Ex. N, Declaration of Harland W. Braun, dated October 17, 2002 ("Braun Decl.") 1; 2 EHT 409, 410.) Braun's general philosophy is that it is better to extract useful information through cross-examination of prosecution experts, because calling a defense expert can hurt the defense if the expert is less than completely helpful. (2 EHT 416.) He consulted with Dr. Baden, hoping to obtain an explanation of Jackson's injuries consistent with Petitioner's description of his rescue attempts. (Braun Decl. 2, 16.) Braun decided not to call Dr. Baden, because Braun did not consider Dr. Baden a strong witness. (2 EHT 414-15.) Dr. Baden said that he could come up with an explanation for Jackson's injuries, but he never actually provided any explanation, nor did he unambiguously state that all of Jackson's injuries could be attributed to either Petitioner's rescue attempts or the paramedics' resuscitation attempts. (2 EHT 420-31; Braun Decl. 16.) Braun thought that Dr. Baden was too "mushy" to be a good witness. (2 EHT 415.) Braun did not want to put Dr. Baden on the stand and have him fail to explain Jackson's injuries before the jury. (Braun Decl. 17.)

Moreover, Braun felt that he obtained 80% of what he needed from Dr. Baden through his cross-examination of Dr. Posey. (2 EHT 417.) Braun was able to show that some of Dr. Posey's conclusions were based on non-medical assumptions, such as that it is the rescuer, rather than rescuee, who gets injured in the course of a rescue. (2 EHT 417; Braun Decl. 9.) Braun also was able to elicit from Dr. Posey helpful testimony that: Petitioner would not have been injured if Jackson had already lost

consciousness; there was no physical evidence that Jackson was in an abusive relationship; and Jackson's consumption of a large amount of alcohol could either aggravate or overcome her fear of swimming. (Braun Decl. 5-11.) Given Braun's view that Dr. Posey was sufficiently damaged by cross-examination and Braun's reservations about Dr. Baden, Braun decided not to call him. (Braun Decl. 4.) However, Braun kept Dr. Baden on call until Braun could see how his cross-examination of Dr. Posey went. (2 EHT 416-17, 442-43.)

Braun's decision not to call defense experts was also affected by his belief that Petitioner would be a good witness, who could "pull the case together." (2 EHT 422-23.) However, contrary to Braun's observations of Petitioner during the months leading up to the trial, Petitioner turned out not to be a good witness. (2 EHT 423; see also Braun Decl. 24, 25.) Dr. Baden testified that in 1998, he met with Braun, Petitioner, and Petitioner's brother at Petitioner's house, and Dr. Baden discussed with them his conclusion that Jackson's death should not have been reclassified as a homicide. (1 EHT 81, 86-88.) In Dr. Baden's opinion, Petitioner's description of the events was credible, because it conformed to the autopsy findings and it is difficult to make up a story that conforms to autopsy findings. (1 EHT 99-100, 115.) Dr. Baden testified that Jackson's injuries were slight and were "magnified out of proportion" at trial. (1 EHT 97.) It is not uncommon for drowning people to bump into things, and further injuries may occur when they are taken out of the water. (1 EHT 97.) Dr. Baden disagreed with Dr. Posey's findings regarding the injuries to Jackson's lips and tongue. Dr. Baden opined that Jackson's tongue injury was something

that happens commonly as a result of rigor mortis and does not help to distinguish an accidental death from a homicide, and her lip injuries could have been caused by CPR intubation and were not caused by blows. (1 EHT 103-06.) According to Dr. Baden: Jackson's scalp injury was consistent with hitting her head on the side of the pool (1 EHT 106-07); her earlobe could have been torn in any number of ways, including after death (1 EHT 119-20); and the injury to her left arm could have been caused by someone grabbing her under her arms or by the pole banging against her (1 EHT 121-22).

Petitioner also presented testimony by forensic pathologist Dr. Paul Herrmann, who testified that, in his opinion, there was no scientific basis for Dr. Posey's conclusion that Jackson's death was due to assisted drowning. (1 EHT 17.) Dr. Herrmann opined that: some of Jackson's abrasions or contusions could have occurred in the course of the paramedics' attempts to revive her; the marks on her chest could be due to fibrillator paddles; and the abrasions on her lips could have occurred during intubation. (1 EHT 28-31, 34-35.) Dr. Herrmann also opined that the bruise on the left side of Jackson's head could have been caused by hitting the side of the pool while swimming and that some (but not all) of her injuries could have been inflicted by the pool pole in the course of a rescue. (1 EHT 52-60.) On the other hand, Dr. Hermann acknowledged that some of Jackson's injuries, such as the bruise on her head and the bruise on her chest, could have been inflicted by a physical attack. (1 EHT 64.)

The state's expert, forensic pathologist Dr. Christopher Rogers, testified that, based on the condition of Jackson's body alone, he could not tell

whether she died as a result of an accident, a homicide, or a suicide. (2 EHT 355.) Dr. Rogers disagreed with Dr. Posey's testimony that none of Jackson's injuries were attributable to the paramedics' efforts to revive her. (2 EHT 377.) There were horseshoe-shaped marks on her body characteristic of defibrillator marks, her tongue injury could have been caused by intubation, and the marks to her lips were consistent with CPR-inflicted injuries. (2 EHT 375-77.) He could not tell what caused the bruises on her body. (2 EHT 358-59.)

After the hearing, the Superior Court denied Petitioner's ineffective assistance claim. The state court found that, although the forensic experts "could have contributed something useful," and "had something to say," ultimately "they said that the forensic evidence would not tell you whether it was an accident, a suicide, or a homicide." (Return, Ex. P at 24.) The court stated:

> The defense experts then were saying you can't tell where the injuries came from. They were nonspecific. They could have happened in any particular scenario either from accident or homicide or the rescue effort by the defendant. You just can't tell.

(Return, Ex. P at 24-25.) 41

The Superior Court declared that, "I don't see how anybody could say there was a deficient performance based on this record." (Return, Ex. P at 25.) The state court pointed out that Braun is experienced and that he interviewed and assessed Dr. Baden. (Id.) Moreover, Braun did not reject Dr. Baden outright; rather, Braun waited to see what he gained from cross-examination before making the judgment not to call Dr. Baden. (Id.) The court agreed with Braun

that he "gained quite a bit." (Id. at 26.) The court concluded that, regardless of whether it or another lawyer would have made the same decision, defense counsel's approach was not unreasonable. (Id.)

After referencing the trial judge's comments on Petitioner's lack of credibility and focusing on the fact that "you just can't tell how the death occurred from the forensic evidence itself," the Superior Court concluded that it did not believe the expert testimony would have changed the result of the trial.[9] (Return, Ex. P at 26.)

The state court's conclusion was a reasonable application of *Strickland*. 28 U.S.C. § 2254(d)(1). "[T]he presentation of expert testimony is not necessarily an essential ingredient of a reasonably competent defense." *Bonin v. Calderon*, 59 F.3d 815, 834 (9th Cir. 1995)(failure to present expert testimony regarding effects of child abuse at sentencing hearing was reasonable, because evidence would have been of value only to the extent defendant could show he was abused and would have refocused jury's attention on his atrocities). Here, defense counsel's decision not to call Dr. Baden was a tactical decision made after defense counsel had interviewed Dr. Baden and assessed him as a witness. "Few decisions a lawyer makes draw so heavily on professional judgment as whether or not to proffer a witness at trial." *Lord v. Wood*, 184 F.3d

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9 Presumably the court was referring to the trial court's comments in denying the motion for a new trial. The trial court commented unfavorably on Petitioner's "lack of candor" on the stand and stated that "the jury certainly can pick up on that." (12 RT 2184-85.)

1083, 1095 (9th Cir. 1999)(noting that, despite the critical nature of the witnesses' testimony that the victim was seen alive after defendant was supposed to have killed her, the court "would nevertheless be inclined to defer to counsel's judgment if they had made the decision not to present the three witnesses after interviewing them in person").

Moreover, defense counsel explained the tactical reasons for his decision not to call Dr. Baden. Defense counsel believed that Dr. Baden's testimony would be too vague to be helpful in showing that Jackson incurred her injuries in a manner consistent with Petitioner's version of the events, and actually might weaken the impact of favorable testimony elicited during counsel's cross-examination of the prosecution expert. This was a reasonable assessment. At the evidentiary hearing, Dr. Baden testified that many of Jackson's injuries could have been caused by Petitioner's rescue attempts or the paramedics' efforts to revive her, but he acknowledged that it was impossible to tell from the forensic evidence alone how the injuries were actually incurred, or whether her death was an accident or a homicide. (1 EHT 103-06, 137.) In addition, as the state court pointed out, defense counsel did not make a final decision regarding whether to call Dr. Baden until after defense counsel completed his cross-examination of Dr. Posey. (2 EHT 416-17, 442; Return, Ex. P at 25.) "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690, 104 S. Ct. at 2066. Counsel's strategic decision not to call Dr. Baden but to rely on the cross-examination of Dr. Posey, made after consulting with Dr. Baden and completing the

cross-examination of Dr. Posey, was well within the bounds of reasonable professional assistance.[10/] Id. at 689, 104 S. Ct. at 2065; see *Shumate v. Newland*, 75 F. Supp. 2d 1076, 1093 (N.D. Cal. 1999)(counsel's

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10 The cases cited by Petitioner in his Traverse are inapposite, because none of them involves a tactical decision, made after adequate investigation, not to present the evidence at issue. See *Hart v. Gomez*, 174 F.3d 1067, 1071 (9th Cir. 1999)(counsel ineffective because he failed to investigate and present documentary evidence corroborating testimony of defendant's girlfriend that she was with defendant on the occasions when he was accused of molesting his child; there was "no reasonable strategy that could account for" the failure to present theevidence); *Sanders v. Ratelle*, 21 F.3d 1446, 1456-57 (9th Cir.1994)(counsel's decision not to call defendant's brother, who from theoutset maintained that he, and not defendant, was the shooter, could not be strategic when counsel did not even interview the brother);*Gersten v. Senkowski*, 299 F. Supp. 2d 84, 103-04 (E.D.N.Y.2004)(counsel ineffective for failing to consult with expert, who would have testified that medical examination of child victim showed that no penetration had occurred; noting heightened need for expert testimonyin child sexual abuse cases); *Harris v. Artuz*, 288 F.3d 247, 257-59 (E.D.N.Y. 2003)(there could be no reasonable strategic basis for failing to introduce expert evidence that eyewitness who claimed to have been shot in the hand was actually stabbed, supporting defense that eyewitnesses had colluded to frame defendant); *Steidl v. Walls*, 267 F. Supp. 2d 919, 922 n.5 (C.D. Ill. 2003)(counsel's failure to consult and call experts, who would have testified that the knife which eyewitness said was used by defendant to kill victim could not have been the murder weapon, was objectively unreasonable).

decision not to call an expert to testify that defendant did not demonstrate characteristics of a child molester was not ineffective when counsel consulted expert but decided that the expert's testimony would be easily attacked by the prosecutor and would not be as strong as testimony from persons who knew defendant); see also *Medearis v. United States*, 469 F. Supp. 2d 779, 789-90 (D. S.D. 2006)(given counsel's familiarity with the medical issues and his effective cross-examination of prosecution expert in rape case, his "strategic decision not to call a medical expert and to attack the credibility of the [prosecution expert] through cross-examination was a reasonable one and was not deficient").

Accordingly, the state court's determination that defense counsel did not perform deficiently when he decided not to call Dr. Baden to testify at trial did not constitute an objectively unreasonable application of *Strickland*.[11] Bell, 535 U.S. at 698-99, 122 S. Ct. at 1852; 28 U.S.C. § 2254(d)(1). Petitioner's ineffective assistance claim on this basis does not warrant federal habeas relief.

2. Failure To Call Dr. Glen Egstrom

Braun testified that one of the issues in the case was the apparent inconsistency between Petitioner's assertion that Jackson was swimming across the pool and the insistence of her family and friends that she

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11 Because Petitioner's claim fails under the deficient performance prong of *Strickland*, the Court will not proceed to the prejudice prong. *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069.

could not swim and had a pathological fear of water. (2 EHT 413.) He consulted Dr. Egstrom regarding the likelihood that a person with a pathological fear of water could overcome her fear and swim in the manner described by Petitioner, but found Dr. Egstrom's responses too vague and equivocal to be helpful. (2 EHT 413, 418; Braun Decl. 18.) Braun decided to keep Dr. Egstrom on call, but felt that calling him might actually harm the defense, because a defense expert should be helpful "all the way across the board" and while Dr. Egstrom would not have given favorable testimony regarding whether Jackson could have swum across the pool as described by Petitioner. (2 EHT 413-14, 420, 439.) Braun thought that rather than rely on expert evidence, it would be a better strategy to try to show that, under the influence of alcohol and in a situation in which she was comfortable, Jackson might have been willing to try to swim even if she usually did not. (2 EHT 422.)

Braun also believed that he did not need Dr. Egstrom, because Braun was able to elicit favorable testimony during cross-examination of Richardson, the prosecution aquatics expert. (2 EHT 419.) Braun was able to show that Richardson's opinions were based on a scenario that involved a trained professional rescuer (unlike Petitioner, who was untrained and intoxicated) and a conscious rescuee rather than an already unconscious "silent sinker." (2 EHT; Braun Decl. 14.)

Dr. Egstrom, a professor at the UCLA physiological science department and a diving safety officer for the Los Angeles County Sheriff's Department, testified that he was contacted by Braun's office in 1997. (1 EHT 148-50.) Dr. Egstrom met with Petitioner and Braun at Petitioner's house,

viewed the pool, made some measurements, and discussed his conclusions. (1 EHT 151-52.) Dr. Egstrom was asked to reserve certain dates for trial, but he was never called to testify. (1 EHT 153.)

Dr. Egstrom testified that he disagrees with Richardson's testimony that in a rescue it is the rescuer who usually gets injured. He opined that each drowning is different and one pattern of injuries is not more likely than another. (1 EHT 156.) He acknowledged that a rescuer can be injured if there is struggling, but stated that the scenario described to him did not involve struggling. (1 EHT 159.) Dr. Egstrom opined that Richardson's testimony that a person who was rescued in the manner Petitioner claimed to have rescued Jackson would have sustained scrapes from the sides of the pool was not relevant, because the molding on Petitioner's pool was smooth and had rounded edges. (1 EHT 157-58.) Dr. Egstrom further testified that it would not be impossible, but would be difficult, to lift a body from the bottom of the pool with a leaf skimmer, especially if the rescuer was intoxicated. (2 EHT 311-13, 333-35.)

Prosecution aquatics expert Alvin Smith, the Aquatic Director for the Los Angeles County Department of Parks and Recreation, testified that he did not think that a person could be lifted from the bottom of the pool using a leaf skimmer, at least not unless the rescuer "got lucky" and was able to slide the pole directly under the midpoint of the person being rescued. Smith further testified that he found Petitioner's testimony that he was unable to pull Jackson up from the bottom of the pool implausible. (2 EHT 392-93, 401, 405-06.) Smith opined that if the rescuer is trained in CPR and understands that the

rescuee can only survive a few minutes underwater without breathing, "something that might eventually work would not be the normal way" of proceeding with a rescue "if you were interested in [the rescuee] getting up and out of the water." (2 EHT 403-04.)

At the conclusion of the hearing, the Superior Court characterized Dr. Egstrom's testimony as "at best unhelpful, at worst at times silly." (Return, Ex. P. at 23.) The state court declared that some of Dr. Egstrom's statements "were just difficult to believe," and it was "not unreasonable . . . for anybody to refuse to bring him on." (Id. at 2324.) The court also stressed that Braun interviewed Dr. Egstrom, and did not make the final decision regarding whether to call him until after cross-examining the prosecution expert. (Id. at 25-26.) The court found that Braun did not perform deficiently in deciding not to call Dr. Egstrom, and the outcome of the trial would not have been different if Dr. Egstrom had testified. (Id. at 26)

The state court's conclusion was not an unreasonable application of Strickland. As with Dr. Baden, defense counsel interviewed Dr. Egstrom and did not make a final decision regarding whether to call him until after completing his cross-examination of the prosecution expert. Defense counsel believed that Dr. Egstrom would not give unambiguously helpful testimony regarding the central issue of whether Jackson could have swum to the deep end of the pool, and defense counsel was afraid that, on cross-examination, Dr. Egstrom might testify that she could not. (2 EHT 419.) Indeed, Dr. Egstrom's testimony at the evidentiary hearing was not uniformly helpful to Petitioner; Dr. Egstrom testified that consumption of alcohol would not always eliminate a person's fear of water, and he gave

testimony implying that it would have been easier for Petitioner to get Jackson's body to the surface by diving in and raising her than by using the leaf net poles. (1 EHT 160; 2 EHT 321-2325, 333-34.) Thus, it was a reasonable strategy to decide not to call Dr. Egstrom and to rely instead on favorable testimony elicited on cross examination of the prosecution aquatics expert, Richardson. See *Strickland*, 466 U.S. at 690, 104 S. Ct. at 2066; *Shumate*, 75 F. Supp. 2d at 1093. Defense counsel's decision not to call Dr. Egstrom was well within the scope of reasonable professional assistance. *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065.

Accordingly, the state court's determination that defense counsel did not perform deficiently when he decided not to call Dr. Egstrom to testify at trial was not an objectively unreasonable application of *Strickland.*12 Bell, 535 U.S. at 698-99, 122 S. Ct. at 1852; 28 U.S.C. § 2254(d)(1). Petitioner's ineffective assistance claim on this basis does not warrant federal habeas relief.

C. Failure To Request Involuntary Manslaughter Instruction (Ground Three).

In Ground Three, Petitioner contends that defense counsel was ineffective because he failed to request an involuntary manslaughter jury instruction based on a mistaken belief that battery could not be a predicate offense for involuntary manslaughter. (Petition at 6; Traverse at 58-67.)

1. Applicable State Law

Under California law, involuntary manslaughter may be a lesser included offense of murder. *People v. Prettyman*, 14 Cal. 4th 248, 274,[12/] 58 Cal. Rptr. 2d 827, 843 (1996). Involuntary manslaughter is the unlawful killing of a human being without malice, which occurs "in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." California Penal Code § 192(b). Depending on the circumstances surrounding its commission, battery may be a predicate misdemeanor offense for a conviction of involuntary manslaughter. *People v. Cox*, 23 Cal. 4th 665, 676, 97 Cal. Rptr. 2d 647, 655-56 (2000); *People v. Wells*, 12 Cal. 4th 979, 988, 50 Cal. Rptr. 2d 699, 704 (1996).

2. Background – Trial Proceedings

After the defense rested, the trial court indicated its intent to instruct the jury regarding involuntary manslaughter. (10 RT 1829-30.) Defense counsel argued that the evidence did not support the giving of an involuntary manslaughter instruction based on battery, because the defense position was that Petitioner did not commit any battery. (10 RT 1830, 1832.) The prosecutor concurred with the trial court's analysis that the evidence of Jackson's injuries, which could have been inflicted in the course of a

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12 Because Petitioner's claim fails under the deficient performance prong of *Strickland*, the Court will not proceed to the prejudice prong. *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069.

battery by Petitioner, supported the giving of an involuntary manslaughter instruction. (10 RT 1832, 1835.)

The issue was revisited during the jury instructions conference the following morning. Defense counsel reiterated his objection to instructing the jury regarding lesser included offenses, stating, "Obviously, it's for tactical reason[s]. I think it's obvious why." (11 RT 1840.) Defense counsel then argued that a battery could not be a predicate offense for involuntary manslaughter. (11 RT 1840-42.) The prosecutor concurred in his analysis. (11 RT 1843.) The trial court ruled that it "reluctantly agree[d]" and, despite its "gut feeling that the involuntary should be given," would not instruct the jury regarding involuntary manslaughter. (11 RT 1843.)

During jury deliberations, the jurors sent the following written inquiry to the trial court:

> Can there be another ruling? Re: A Provocation to be sufficient to reduce the homicide to manslaughter. Are guilty in the first or second degree or not guilty our only options?

(3 CT 563, 566; 12 RT 2121.)

The trial court notified counsel regarding the jury's questions and ordered them to contact the court regarding a response. (3 CT 566.) The following morning, defense counsel stated that he had discussed the matter with Petitioner, and defense counsel moved for a mistrial on the ground that an instruction referring to manslaughter had been erroneously given to the jury, although they had not been instructed regarding manslaughter as a possible

verdict.[13] (12 RT 2121-23.) The trial court denied the motion for mistrial. (12 RT 2124.) It instructed the jury that "provocation could be used only to determine the degree of the crime. See [CALJIC] 8.73." It responded "Yes" to the second question. (12 RT 2165; 3 CT 564, 621.)

Two and a half hours later, the jury informed the trial court that it had reached a verdict. (3 CT 621.)

3. Background--Post-Conviction Proceedings

On direct appeal, Petitioner contended that the trial court erred in failing to instruct the jury regarding involuntary manslaughter. The California Court of Appeal rejected his claim, stating:

> The trial court offered to instruct on involuntary manslaughter. For what defense counsel expressly described as tactical reasons, [Petitioner] objected to any such instruction. He may not successfully complain of this

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13 The jury was inadvertently instructed with CALJIC No. 8.73 which provided, among other things, that:

> If the evidence establishes that there was provocation which played a part in inducing an unlawful killing of a human being, but the provocation was not sufficient to reduce the homicide to manslaughter, you should consider the provocation for the bearing it may have on whether the defendant killed with or without deliberation or premeditation.

(3 CT 603.)

invited error.
(Return, Ex. D at 12.)

In his state habeas proceedings, Petitioner contended, as he does here, that defense counsel was ineffective for failing to request the involuntary manslaughter instruction. Petitioner submitted a declaration in which he declared that: (1) he placed no limitations on defense counsel's trial decisions; (2) defense counsel never discussed with him the possibility of presenting alternative defenses such as involuntary manslaughter; and (3) defense counsel never discussed with him the issue of "waiving jury instructions on lesser included offenses." (Return, Ex. G [Declaration of Donald James Bohana, dated January 7, 2002 ("Bohana Decl.")] 5, 6.) Petitioner declared that, after the jury submitted its question, defense counsel assured him that a mistrial would be declared and cautioned him that, if manslaughter instructions were given, the jury would convict him of manslaughter. (Bohana Decl. ¶ 6.)

At the evidentiary hearing on this claim, defense counsel testified that Petitioner never indicated to him that he had any altercation with Jackson and always maintained his innocence. (2 EHT 411-12, 430-31.) Defense counsel accepted Petitioner's version of the events, which was consistent with what Petitioner had told the sheriffs, and would have considered it unethical to suggest putting together an alternative version involving an altercation with Jackson. (2 EHT 430.)

Defense counsel testified that, contrary to Petitioner's assertion in his declaration, he and Petitioner discussed whether to ask for lesser included offense instructions. (2 EHT 431.) They made the decision not to do so as part of the overall

strategy in the case, which was to force the jury to choose between the prosecution's theory of murder and the defense theory of rescue, rather than to compromise on a manslaughter verdict. (2 EHT 424, 427, 431, 450.) Petitioner felt that he had done nothing wrong and did not want to be convicted of manslaughter. (2 EHT 424, 431, 450.)

Defense counsel testified that his strategy was to "keep out" the manslaughter instructions, but he did not remember the arguments he made to the trial court. (2 EHT 448.) In his view, there was no evidence of battery or reckless rescue, and the evidence did not support an involuntary manslaughter verdict. (2 EHT 425-26, 448-49.) He did not recall saying that battery could not be a predicate offense for misdemeanor manslaughter. (2 EHT 450.) Defense counsel testified that Petitioner was present and was "part of the discussion" with the trial court regarding whether to give the manslaughter instructions. (2 EHT 425.)

Defense counsel acknowledged that, after the jury submitted its question, it was clear that the jury was not "going for" an acquittal. (2 EHT 426.) He discussed with Petitioner whether they should ask for a manslaughter instruction or for a mistrial. (2 EHT 427.) Petitioner did not want a manslaughter instruction, and they decided to ask for a mistrial. (2 EHT 427.) Defense counsel acknowledged that he probably told Petitioner that, if manslaughter instructions were given at that point, the jury would return a manslaughter verdict. (2 EHT 431.)

Petitioner's brother, Lawrence Bohana, testified that he was present during the discussion between Petitioner and defense counsel regarding the jury's note. (2 EHT 463.) Defense counsel stated that they

should ask for a mistrial, because he had not presented any evidence regarding lesser included offenses and had not argued the issue in his closing statement. (2 EHT 463-64.) Petitioner agreed, but he did not otherwise comment. (2 EHT 466.)

The Superior Court rejected Petitioner's ineffective assistance claim. (Return, Ex. P at 26-29.) The state court acknowledged that the legal argument made by defense counsel to the trial court, i.e., that battery cannot be the predicate offense for involuntary manslaughter, was incorrect, and noted that if that was the only issue, it would grant relief. (Id. at 27-28.) It then pointed out that there was no evidence that could support an involuntary manslaughter instruction except for the bruises on Jackson's body, and the defense experts at the evidentiary hearing had testified that it was impossible to tell how she sustained those bruises. (Id. at 27.) The court declared that the more important point was that the defense made a tactical decision to avoid the giving of an involuntary manslaughter instruction, and defense counsel's incorrect legal argument was merely one of the arguments used to accomplish that goal. (Id. at 28.) The court stated that it accepted defense counsel's representation that Petitioner "felt he was simply not guilty of any wrongdoing, and it was going to be an all or nothing decision." (Id.)

The Superior Court found that Petitioner participated in the decision to present the jury with an "all or nothing" choice, although there was conflicting evidence regarding whether he participated verbally or simply did not object. (Return, Ex. P at 27-28.) It pointed out that Petitioner was present both when the trial court gave

its analysis of why an involuntary manslaughter instruction should be given and when defense counsel discussed the jury's note, and there was no evidence that he did not understand what was happening. (Id.) The state court concluded:

> And whether you believe he participated verbally or simply didn't object, I think he was part of the decision not to go forward with the involuntary manslaughter. And it was a dicey decision, and it was a reasonable tactical decision on the part of the defense. And I think the defense made that decision as a group, as a team.

(Return, Ex. P at 28-29.)

4. Analysis

The state court reasonably applied *Strickland* in concluding that defense counsel's decision not to request an involuntary manslaughter instruction was a reasonable tactical decision and did not constitute ineffective assistance of counsel. Petitioner's defense was that Jackson started to sink while swimming across the pool, was injured in the course of his rescue efforts, and drowned because he was unable to rescue her in time. Petitioner's testimony was the only eyewitness account; the prosecution's case relied solely on circumstantial evidence. The defense made the tactical decision to deny the jury the option of an intermediate manslaughter verdict, believing that the evidence supporting the defense version was sufficiently strong that if the jurors were forced to choose between murder and "not guilty," they would vote for "not guilty." "With the benefit of hindsight we know that this strategy was incorrect; however, it

did not constitute ineffective assistance of counsel." *Bashor v. Risley*, 730 F.2d 1228, 1241 (9th Cir. 1984)(counsel's failure to request instruction was "the result of a tactical decision that the jury should be forced to the choice of finding Bashor guilty of deliberate homicide or acquitting him outright" and was not ineffective).

Moreover, defense counsel's decision to pursue an all-or-nothing defense and reject instructions on the lesser-included offenses was consistent with Petitioner's testimony at trial that he did not have any physical or verbal altercation with Jackson and did not strike her. Nothing in Petitioner's testimony supported an involuntary manslaughter verdict; the jury could have returned an involuntary manslaughter verdict (given the option) only if it had rejected Petitioner's version of the events and concluded, based on the prosecution evidence, that he hit Jackson or otherwise committed a battery on her.[14/] Counsel does not render ineffective assistance by declining to pursue a strategy that is inconsistent with defendant's protestations of innocence or conflicts with his version of the events.[15/]

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14 There was no prosecution or defense evidence supporting the giving of an involuntary manslaughter instruction under the theory that Petitioner had engaged in a lawful act which, under the circumstances, amounted to criminal negligence.

15 See *Williams v. Woodford*, 384 F.3d 567, 611 (9th Cir.2004)("Given this factual support for the alibi defense, it was clearly within the wide range of professionally competent assistance for [defense counsel] to choose not to present a psychiatric defense theory that could conflict with the alibi defense.";

Petitioner argues that defense counsel's decision cannot be considered strategic, because it was based on a misunderstanding of the applicable law. (Traverse at 63.) It is true that defense counsel incorrectly argued to the trial court that battery cannot be a predicate offense for involuntary manslaughter. (11 RT 1840-42.) Contrast *Butcher*, 758 F.2d at 376 (noting that "defense counsel, with adequate knowledge of the law and the evidence" abandoned pursuit of a lesser included offense instruction in accordance with trial strategy); Bashor, 730 F.2d at 1241 ("The record discloses that counsel did so [failed to request a lesser included offense instruction] not out of ignorance of the law but as the result of a tactical decision"). However, the Court concurs with the state court's conclusion that,

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internal quotation marks omitted); *Turk v. White*, 116 F.3d 1264, 1266-67 (9th Cir. 1997)(defense counsel was not ineffective for failing to pursue a diminished-capacity defense, because it would have conflicted with the primary defense ofself-defense); *Butcher v. Marquez*, 758 F.2d 373, 376 (9th Cir.1985)(counsel was not ineffective for choosing to forego voluntary manslaughter instruction, because the defense theory was that defendant did not commit the charged act, not that he committed it under provocation); see also *Walker v. Schriro*, 2007 WL 4168675, *28-29 (D.Ariz. 2007)(when defendant was charged with murdering victim by throwing boiling water on her, counsel's decision to pursue an all-or nothing defense was not ineffective when a lesser included offense instruction would have been inconsistent with defendant's trial testimony that the intoxicated victim accidentally burned herself).

whether or not defense counsel's mistaken legal argument persuaded the trial court not to give the instruction, that argument did not constitute the reason why defense counsel did not want the instruction to be given. Rather, defense counsel argued against the giving of the involuntary manslaughter instruction, because he had made the tactical decision to present the jury with an "all or nothing" choice between murder if it accepted the prosecution's version, and a "not guilty verdict" if it believed Petitioner's testimony.

The Court also concurs with the state court's conclusion that Petitioner acceded to defense counsel's decision not to give the jury the option to return an involuntary manslaughter verdict. While the state court did not make a credibility determination as between defense counsel's assertion that Petitioner insisted that he did not want a manslaughter instruction and Petitioner's assertion that he simply acquiesced in defense counsel's decision, it is undisputed that Petitioner was present during the arguments about the involuntary manslaughter instruction before the jury retired, heard about the jury's questions from defense counsel, and was present during the discussions between counsel and the trial court regarding how to respond. There is no contention that Petitioner did not understand the issues or the stakes.

Defense counsel's strategy was a risky one. With the benefit of hindsight, defense counsel admits that, if he could do it over, he would not argue against the trial court's intention to give the involuntary manslaughter instruction. (Braun Decl. 31; 2 EHT 425.) Hindsight, however, has no place in assessing the reasonableness of his strategy. *Gentry*, 540 U.S.

at 8, 124 S. Ct. at 6; *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065; see also *Anderson v. Calderon*, 232 F.3d 1053, 1089 (9th Cir. 2000)("[I]t is not whether [counsel] won or lost, it is how he played the game that counts."), overruled on other grounds, *Osband v. Woodford*, 290 F.3d 1036, 1043 (9th Cir. 2002). Viewed from defense counsel's perspective at the time of trial as explained at the evidentiary hearing, as this Court must do (see *Wiggins*, 539 U.S. at 523, 123 S. Ct. at 2536; *Strickland*, 466 U.S. at 689, 109 S. Ct. at 2065), his strategy was reasonable.

Accordingly, the state court's determination, made after an evidentiary hearing, that defense counsel did not perform deficiently when he failed to request an involuntary manslaughter instruction was not an objectively unreasonable application of *Strickland*.[16] Bell, 535 U.S. at 698-99, 122 S. Ct. at 1852; 28 U.S.C. § 2254(d)(1). Petitioner's ineffective assistance claim on this basis does not warrant federal habeas relief.

D. Failure To Object (Ground Four)

In Ground Four, Petitioner contends that defense counsel was ineffective, because he failed to object to "inadmissible, prejudicial evidence [P]etitioner consulted with counsel, irrelevant opinions as to [P]etitioner's testimony and the incident, and misstatements of fact by the state's attorney." (Petition at 6.)

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16 Because Petitioner's claim fails under the deficient performance prong of *Strickland*, the Court will not consider the prejudice prong. *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069.

1. Consultation With Counsel

Deputy Sheriff Mark Ballin came to Petitioner's house in response to his 911 call. (3 RT 521-22.) During direct examination by the prosecutor, Deputy Ballin testified that Petitioner "seemed to be more concerned about his own welfare than [the victim's]." (3 RT 534.) Asked to elaborate, he stated, "Never even asked about her or where we were taking her or anything. He just told me he wanted to speak with his attorney. Didn't want to speak with me." (3 RT 534.) Deputy Ballin then testified that Petitioner had a conversation with him after Petitioner's brother arrived. (3 RT 534.) Defense counsel did not object to this testimony.

Later, defense counsel advised the trial court that the prosecutor had told him she intended to elicit from Deputy Burks, who was also on the scene, testimony that Petitioner said, "I'm not going to answer another fucking question until my attorney gets here." (4 RT 800.) The trial court ruled that it would exclude the evidence under United States v. Doyle, 426 U.S. 610, 96 S. Ct. 2240 (1976), and as more prejudicial than probative under California Evidence Code § 352. (5 RT 805.)

During closing argument, the prosecutor noted that the defense might argue that Sergeant Watkins' testimony regarding what Petitioner said during his interview was not credible, because he chose not to use a tape recorder. (11 RT 1942.) She stated:

> What did Sgt. Watkins tell you about the point where he [Petitioner] sat down, what he noticed is suspicious circumstances of a drowning? A woman is dead. She's up against

> the tree.
>
> He [Petitioner] did not cooperate with the paramedics. He did not cooperate with the sheriffs.
>
> Now, I have a opportunity to actually get a statement from this person. He's in there talking to his brother who is a lawyer. The fact that he's even willing to give me a statement at this time when he's had advice of counsel, I'm not doing anything to jeopardize it because I had experience with using tape recorders, and often suspects clam up when they see a tape recorder in front of them. So I'm not even going to chance it because this is so suspicious.

(11 RT 1943)(emphasis added). Defense counsel did not object to this argument by the prosecutor.

Petitioner argues that defense counsel should have objected to Deputy Ballin's testimony and the prosecutor's argument on the grounds that they violated Petitioner's Fifth and Fourteenth Amendment rights under Doyle. (Traverse at 68.) In Doyle, the Supreme Court held that a prosecutor may not impeach a defendant by referring to his post-arrest silence after receiving warnings under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966). Doyle, 426 U.S. at 619, 96 S. Ct. at 2245. The prosecutor also may not refer to a defendant's post-arrest, post-Miranda invocation of his right to counsel. *Wainwright v. Greenfield*, 474 U.S. 282, 295, 106 S. Ct. 634, 640 (1986). This rule is founded on "the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial." *South Dakota v.*

Neville, 459 U.S. 553, 565, 103 S. Ct. 916, 923 (1983). However, *Doyle* and *Wainwright* involved a defendant's post-arrest, post-Miranda silence. The Supreme Court has held that a defendant's pre-arrest, pre-Miranda silence may be used for impeachment (see *Jenkins v. Anderson*, 447 U.S. 231, 235, 100 S. Ct. 2124, 2127-28 (1980)), but has not addressed whether it may be used as substantive evidence of guilt. The federal circuits are split, but in the Ninth Circuit a defendant's pre-arrest, pre-Miranda silence may be used both for impeachment and as substantive evidence of guilt. *United States v. Oplinger*, 150 F.3d 1061, 1067 (9th Cir. 1998).

Deputy Ballin's testimony pertained to Petitioner's conduct after Jackson's drowning, before it was even clear that a crime had taken place and well before Petitioner was arrested. Thus, Deputy Ballin's testimony regarding Petitioner's pre-arrest, pre-Miranda reluctance to speak with him until after he had spoken with his brother, a lawyer, did not implicate Petitioner's constitutional rights. *Oplinger*, 150 F.3d at 1067. It is not ineffective to fail to make a meritless objection. See *James v. Borg*, 24 F.3d 20, 27 (9th Cir. 1994); *Boag v. Raines*, 769 F.2d 1341, 1344 (9th Cir. 1985).

Moreover, Deputy Ballin made the statement in response to a question asking him to elaborate on his testimony that Petitioner appeared not to be concerned about the victim's welfare. (3 RT 534.) Thus, defense counsel could not have objected before Deputy Ballin answered, and to have objected or moved to strike afterwards would have only focused the jury's attention on the testimony. Significantly, although the prosecutor then asked Deputy Ballin

whether Petitioner talked with his brother, she did not elicit testimony at that time that Petitioner's brother was an attorney. (3 RT 534.) For these additional reasons, defense counsel was not ineffective for failing to object to
Deputy Ballin's testimony.

As for the prosecutor's comments during closing argument, they were not improper because, as discussed above, Petitioner had not yet been placed in custody or given his Miranda warnings. See *Fletcher v. Weir*, 455 U.S. 603, 607, 102 S. Ct. 1302, 1312 (1982)(no due process violation to comment on silence "in the absence of the sort of affirmative assurances embodied in the Miranda warnings"). Moreover, "Doyle does not impose a prima facie bar against any mention whatsoever of a defendant's right to request counsel, but instead guards against the exploitation of that constitutional right by the prosecutor." *Lindgren v. Lane*, 925 F.2d 198, 202 (7th Cir. 1991). Here, the prosecutor referred to Petitioner's consultation with his brother, a lawyer, not in order to show guilt or discredit the story Petitioner subsequently told the police, but to explain how Petitioner's behavior excited suspicion and caused Sergeant Watkins to decide not to jeopardize the interview by taping it. (11 RT 1943.) Thus, there was no legal basis for an objection, and defense counsel's failure to object was not ineffective. See *James*, 24 F.3d at 27; Boag, 769 F.2d at 1344.

Accordingly, Petitioner's ineffective assistance claim on this basis does not warrant federal habeas relief.

2. Characterizations

Petitioner contends that defense counsel was ineffective, because he failed to object to irrelevant evidence that the incident was "very odd," "unusual," "weird," and something a detective "didn't like." (Petition at 6.) Specifically, Petitioner complains that defense counsel should have objected to the following testimony and argument:

1. Paramedic Coffey's testimony that he found it "very odd" that Petitioner seemed calm, displayed no emotion, and never asked how Jackson was doing. (3 RT 387.)

2. Detective Snapper's testimony that he was contacted by his partner, Sergeant Watkins, who told him "there were circumstances he didn't like" and requested him to come to Petitioner's house. (8 RT 1418.)

3. Deputy Ballin's testimony that it was "unusual" that Petitioner was belligerent. (3 RT 533.)

5. The following statements by the prosecutor while discussing Sergeant Watkins's interview of Petitioner: "Let me have someone that's more experienced in homicide be right there with me. So two people can listen to his story because it's suspicious, it's unnatural, it's weird. She's against a tree. He wouldn't help the paramedics." (11 RT 1944; emphasis added.)

(Traverse at 69.)

With respect to paramedic Coffey's "very odd" comment, the record shows that defense counsel objected to the question that elicited the testimony, and the trial court overruled the objection. (3 RT 387.) Thus, defense counsel did not fail to object, and

Petitioner's ineffective assistance claim on that basis is without merit.

Furthermore, there were no meritorious grounds for an objection. Petitioner characterizes the statements at issue as irrelevant and impermissible opinions and, in the case of Detective Snapper's testimony about what Sergeant Watkins said, inadmissible hearsay. (Petition at 6; Traverse at 69.) However, Petitioner's demeanor and conduct shortly after Jackson's drowning, and in particular his perceived lack of concern about her well-being, was certainly relevant to the issue of whether she had drowned accidentally or was murdered by Petitioner. Moreover, it is clear from the context that paramedic Coffey and Deputy Ballin used terms such as "odd" and "unusual" merely to convey that Petitioner's demeanor and conduct did not conform to their prior observations of the demeanor and conduct of persons who had just seen someone they knew suffer a sudden death or injury. (3 RT 387, 533.)

An objection to Detective Snapper's statement on hearsay grounds also would have been denied, given that Sergeant Watkins' statement that he "didn't like" the circumstances was not offered for the truth of the matter asserted, but only to show why there were two homicide detectives at Petitioner's house, rather than one as is usual in drowning cases. (8 RT 1418.) See California Evidence Code § 1200(a)(defining hearsay). Finally, there was nothing improper about the prosecutor's use of terms such as "unnatural" and "weird" to describe how Sergeant Watkins arrived at his view that a second detective should be present at Petitioner's interview. It is not ineffective to fail to make a non-meritorious objection. See *James*, 24 F.3d at 27; Boag, 769 F.2d at

1344.

Accordingly, Petitioner's ineffective assistance claim on this basis does not warrant federal habeas relief.

4. Factual Misstatements During Closing Argument

Petitioner contends that defense counsel was ineffective, because he failed to object to misstatements of fact by the prosecutor during her closing argument. (Petition at 6; Traverse at 69-72.) The prosecutor stated that Dr. Posey had testified that petechial hemorrhages occur when blood vessels burst in the eye because "you're being choked or air is being cut off." (11 RT 1904.) The prosecutor continued:

> And that only happens when air is being cut off. The injuries on her lips, the fact that she bit down on her tongue, coupled with abrasions and scratches on her upper nose and the abrasions and scratches underneath her chin. . . . [] It is typically when someone has put their hand over the mouth. They are covering the nose and the lips and they are cutting off the air. He said the natural reaction is to try to get the hand away and to breathe.

(11 RT 1904.) The prosecutor then argued that "petechial hemorrhages coupled with the multiple laceration and the bitten lip and tongue suggested that someone was putting their hand keeping her from breathing." (11 RT 1904-05.)

During rebuttal argument, the prosecutor stated, while arguing that Jackson's injuries could not have been caused by Petitioner's rescue attempts, that Jackson "had a bitten tongue, yes, but she also had

bitten lips, petechia in the eyes which is a fingerprint from being choked." (12 RT 2076.)

Defense counsel did not object to any of these statements. Later during the prosecutor's rebuttal argument, a bench conference was held regarding an objection made by defense counsel with respect to another issue. (12 RT 2079.) During that conference, the trial court told the prosecutor:

> I think you're getting to the point that you are misstating the evidence, like, the part where you are indicating choking. There's no testimony related to choking.
>
> The expert testified that asphyxia is an indication of petechial hemorrhage. It has nothing to do with choking.
>
> As a matter of fact, he said there was no choking because there was no breakage in the hyoid bone. So let's not mention that part.
> I don't want to get to the point where I'm going to have to allow defense counsel to rebut your argument. But I would do that if you continue to misstate testimony.

(12 RT 2080-81.) Petitioner contends that defense counsel was ineffective for failing to object to the prosecutor's statements. (Traverse at 70.)

A review of the record shows that some of the prosecutor's comments were supported by the evidence and some were not. Asked whether Jackson's facial and lip and tongue injuries suggested that at some point a hand was held against her mouth, Dr. Posey acknowledged that it was a possible scenario. (5 RT 894-95, 922-23.) The prosecutor could thus argue, based on the coroner's testimony, that Jackson's lip and tongue injuries and facial scratches suggested that a hand was held against her mouth to

prevent her from breathing. (11 RT 1904.)

However, to the extent the prosecutor claimed that the petechial hemorrhages in Jackson's eye showed that a hand was held against her mouth or that she was choked, there was no evidence supporting this argument. Although the prosecutor had asked Dr. Posey whether a petechial hemorrhage was "a fingerprint for someone who has been choked," Dr. Posey explained that a petechial hemorrhage can occur in any death from asphyxia, and drowning is an asphyxial death. (5 RT 828, 853, 894.) Thus, Dr. Posey's testimony provided no basis for an argument that the petechial hemorrhages showed that Jackson had been choked. Moreover, Dr. Posey expressly testified that Jackson's injuries did not indicate choking. He answered "No" when asked whether Jackson's blunt force trauma injuries suggested that she was choked, and he testified that the nature of her neck injuries showed that there was no manual strangulation. (4 RT 842,887-88.) In fact, the trial court cautioned the prosecutor that she was misstating the record on this point. (12 RT 2080-81.)

Nevertheless, defense counsel's failure to object to these misstatements did not rise to the level of ineffective assistance. Unless the prosecutor's misstatements are egregious, a defense counsel's decision not to object during closing argument is generally ascribed to tactical reasons and considered to be within the scope of permissible professional conduct. *United States v. Molina*, 934 F.2d 1440, 1448 (9th Cir. 1991)("From a strategic perspective, for example, many trial lawyers refrain from objecting during closing argument to all but the most egregious misstatements by opposing counsel on the theory that the jury may construe their objections to

be a sign of desperation or hyper-technicality."); *United States v. Neoechea*, 986 F.2d 1273, 1281 (9th Cir. 1993)("Because many lawyers refrain from objecting during opening statement and closing argument, absent egregious misstatements, the failure to object during closing argument . . . is within the 'wide range' of permissible professional legal conduct."). The prosecutor's statements about the significance of Jackson's petechial hemorrhage in conjunction with her facial injuries constituted a fair inference from the evidence, and while the prosecutor's assertion that Jackson's petechial hemorrhage indicated choking was a misstatement of Dr. Posey's testimony, it was not a sufficiently egregious misstatement to render defense counsel's failure to object deficient under the first prong of *Strickland*. See *Molina*, 934 F.2d at 1448; *Neoechea*, 986 F.2d at 1281.

Nor has Petitioner shown prejudice under the second prong of *Strickland*. The trial court instructed the jury that "statements made by the attorneys during the trial are not evidence." (11 RT 1849 [CALJIC 1.02].) Moreover, given the numerous other injuries on Jackson's head and neck, evidence that she was afraid of the water and could not swim, and evidence suggesting that Petitioner did not immediately call 911 after taking her from the pool and appeared unconcerned about whether she survived, there is no reasonable likelihood that the jury considered the prosecutor's passing assertions that Jackson's petechial hemorrhages indicated choking to be of sufficient significance that the result of the trial would have been different if defense counsel had objected. *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068.

Accordingly, Petitioner's ineffective assistance claim on this basis does not warrant federal habeas relief.

D. Failure To Advise Petitioner Of Alternative Defenses (Ground Five)

In Ground Five, Petitioner contends that defense counsel was ineffective, because he failed to advise Petitioner of alternative defenses such as excusable homicide[17]17 or manslaughter based on the theory that Petitioner committed a battery, or was involved in some altercation with Jackson, that led to her falling into the pool and drowning. (Petition, Attachment.) Petitioner asserts that if defense counsel had discussed these alternative defenses with him, "he might have elected not to testify, thereby depriving the jury of the adverse credibility determination that probably tipped the balance against him." (Id.)

At the evidentiary hearing regarding Petitioner's

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17 California Penal Code § 195 provides:

Homicide is excusable in the following cases:

1 When committed by accident and misfortune, or in doingany other lawful act by lawful means, with usual andordinary caution, and without any unlawful intent.

2 When committed by accident and misfortune, in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, when no undue advantage is taken, nor any dangerous weapon used, and when the killing is not done in a cruel or unusual manner.

ineffective assistance claims, defense counsel testified that at one point he broached with Petitioner the subject of approaching the prosecution with an offer of a guilty plea to a manslaughter verdict, but Petitioner refused, insisting he was innocent. (2 EHT 423.) As previously discussed, defense counsel testified that Petitioner did not want the jury to have the option of convicting him of manslaughter, because he felt that he was not guilty of any crime. (2 EHT 423-24.) Furthermore, Petitioner never indicated to defense counsel any facts that would have supported an excusable homicide defense or a manslaughter defense;

Petitioner always maintained that there was no altercation between him and Jackson and that she had swum to the deep end herself. (2 EHT 41112; see Bohana Decl. 22.) Defense counsel would have considered it unethical to suggest to Petitioner that they put together a defense based on a version of the events different from what Petitioner maintained had happened. (2 EHT 430.)

Petitioner argues that defense counsel had an obligation not to rely solely on what Petitioner told him and to conduct an investigation of available defenses based on other available evidence. (Traverse at 71-72.) He attempts to analogize his case to *Johnson v. Baldwin*, 114 F.3d 835 (9th Cir. 1997), in which the Ninth Circuit held that defense counsel was ineffective for failing to investigate and discredit his client's "incredibly lame" story that he was not present at the scene of the charged rape. Id. at 838. The Ninth Circuit found that if counsel had investigated properly and confronted the defendant with the difficulties of his story, he could have advised the defendant to defend against the rape

charge by admitting that he was present but maintaining that no rape had occurred (a strategy followed by defendant's brother at a separate trial and resulting in his acquittal), or to elect not to testify, thus depriving the prosecution of the adverse credibility determination which, given the "extremely weak" evidence that a rape had occurred, "probably tipped the balance" against him. Id. at 838-39.

Similarly, in *Phillips v. Woodford*, 267 F.3d 966 (9th Cir. 2001), the Ninth Circuit found that defense counsel was ineffective when he failed to investigate any defense other than the alibi defense he presented at trial, although he had in his possession evidence supporting a defense that the victim was killed during a "shoot-out." At an evidentiary hearing, defense counsel admitted that he never actually believed in defendant's alibi, given the overwhelming evidence that defendant was present at the shooting. Id. at 977-78.

Here, Petitioner does not point to any reason why defense counsel should have refused to accept Petitioner's version of the events, or why it would not have been unethical for counsel to suggest to Petitioner that he advance a different version of the facts. Contrast *Phillips*, 267 F.3d at 977-78 (defense counsel's admission that he never believed in defendant's alibi contradicted his contention that it would have been unethical to assist the defendant in committing perjury by admitting presence on the scene). Unlike *Johnson* and *Phillips*, there was no eyewitness evidence flatly contradicting what Petitioner told defense counsel had happened. Rather, Petitioner argues that the evidence of Jackson's injuries, her "questionable" swimming ability, and her intoxication supported a defense that

she drowned "after some kind of altercation with [P]etitioner or some accidental act on his part." (Traverse at 74.) Petitioner further argues that if counsel had investigated and developed expert testimony that Jackson's head wound might have been caused by hitting her head on the side of the pool or falling in the pool, Petitioner might have elected not to testify. (Id.) If Petitioner had not testified, the jury could not have made the adverse credibility determination that, according to both defense counsel and the trial court, likely adversely affected the verdict. (See 12 RT 2184-85; Bohana Decl. 24, 25.)

Petitioner's argument is wholly unpersuasive. If defense counsel had presented an excusable homicide defense based on Jackson falling into the pool or hitting her head as a result of some accidental act by Petitioner, and even if Petitioner had not testified, defense counsel would have been obliged to explain why Petitioner previously told a different story to the police and to Jackson's friends and relatives. Thus, an excusable homicide defense would have been damaging to Petitioner's credibility regardless of whether he testified, because his own counsel would have had to admit that Petitioner's early descriptions of the events were a lie. (See Braun Decl. 28.) The same would have been true if counsel had presented a defense that Jackson's death was only manslaughter.

This is simply not a situation, as in Johnson and Phillips, where counsel's failure to investigate facts or information contrary to his client's story resulted in the presentation of a weaker defense when a stronger one was available. Defense counsel reasonably presented a defense that was consistent

with the version of the events that Petitioner had maintained from the start, under which Petitioner did not have an altercation with Jackson and did not commit any accidental act resulting in her death, but merely bungled a rescue. Moreover, there is no reasonable likelihood that an excusable homicide defense could have succeeded when Petitioner had denied to the police committing any accidental act leading to Jackson's death. Thus, even if defense counsel did not discuss alternative defenses with Petitioner, his failure to do so was not deficient and did not constitute ineffective assistance. *Strickland*, 466 U.S. at 690, 104 S. Ct. at 2066.

Accordingly, Ground Five does not warrant federal habeas relief.

V. AN EVIDENTIARY HEARING IS NOT WARRANTED.

Petitioner requests an evidentiary hearing with respect to his ineffective assistance claim alleged in Ground Four. (Traverse at 7172.) The state court evidentiary hearing did not encompass this claim. The Ninth Circuit has repeatedly held that an evidentiary hearing is neither appropriate nor required when, as here, the issues can be resolved by reference to the record and the petitioner fails to make out a colorable constitutional claim in light of the record. See *Babbitt v. Calderon*, 151 F.3d 1170, 1176 (9th Cir. 1998); see also *Totten v. Merkle*, 137 F.3d 1172, 1177 (9th Cir. 1998)(no evidentiary hearing required where lack of prejudice is apparent from the record); *Williams*, 52 F.3d at 1484 (no evidentiary hearing is required when the court, without resolving disputed facts not found by the

state courts, can conclude that no entitlement to federal habeas relief has been shown); *Campbell v. Wood*, 18 F.3d 662, 679 (9th Cir. 1994). More recently, in *Schriro v. Landrigan*, 127 S. Ct. at 1940, the Supreme Court approved this "recognized . . . point," concluding that "if the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing."

Petitioner's claims can be resolved based on the record and he has shown no colorable constitutional violation in light of the record.
Accordingly, there is no basis for holding an evidentiary hearing on this claim.

RECOMMENDATION

For the foregoing reasons, IT IS RECOMMENDED that the District Court issue an Order: (1) accepting and adopting this Report and Recommendation; (2) denying the Petition; and (3) directing that Judgment be entered dismissing this action with prejudice.
DATED: February 8, 2008

/s/MARGARET A. NAGLE
UNITED STATES MAGISTRATE JUDGE

APPENDIX C

No. 08-56855

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DONALD JAMES BOHANA, Petitioner-Appellant,

vs.

TOM E. VAUGHN, WARDEN, and JEANNE S. WOODFORD, DIRECTOR OF CALIFORNIA DEPARTMENT OF CORRECTIONS, Respondents-Appellees.

ORDER

FILED: October 8, 2010

Before: FARRIS, HALL and SILVERMAN, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. Judge Silverman votes to deny the petition for rehearing en bane, and Judges Farris and Hall so recommend.

The full court has been advised of the petition for rehearing en bane and no judge has requested a vote on whether to rehear the matter en bane. Fed. R, App. P. 35.

The petition for panel rehearing and the petition for rehearing en bane are

DENIED.

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No. 08-56855

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DONALD JAMES BOHANA,Petitioner-Appellant,

vs.

TOM E. VAUGHN, WARDEN, and JEANNE S. WOODFORD, DIRECTOR OF CALIFORNIA DEPARTMENT OF CORRECTIONS, Respondents-Appellees.

ORDER

FILED: August 4, 2010

Appellant's request for extension of time to file Petition For Rehearing and For Rehearing En Banc is granted.

Petition For Rehearing and Suggestion For Rehearing En Banc is due on or before September 7,2010.

FOR THE COURT:
Molly C. Dwyer
Clerk of Court
/s/
Theresa Benitez
Deputy Clerk

APPENDIX D

United States Constitution, Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

28 U.S.C. §2253(c)

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--

(A) the final order In a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Federal Rules of Appellate Procedure Rule 22

(b) Certificate of Appealability.

(1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue. The district clerk must send the certificate or statement to the court of appeals with

the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate.

(2) A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes. If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals.

(3) A certificate of appealability is not required when a state or its representative or the United States or its representative appeals.

Circuit Rule 22-1(e). Certificate of Appealability (COA)

Briefing Uncertified Issues. Petitioners shall brief only issues certified by the district court or the court of appeals. Alternatively, if a petitioner concludes during the course of preparing the opening brief, that an uncertified issue should be discussed in the brief, the petitioner shall first brief all certified issues under the heading, "Certified Issues," and then, in the same brief, shall discuss any uncertified issues under the heading, "Uncertified Issues." Uncertified issues raised and designated in this manner will be construed as a motion to expand the COA and will be addressed by the merits panel to such extent as it deems appropriate. Except, in the extraordinary case, the court will not extend the length of the brief to accommodate uncertified issues. *(New 1/1/04)*